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REVIVING THE ROMAN REPUBLIC; REMEMBERING THE GOOD OLD CAUSE

*Rob Atkinson*¹

Caesar had his Brutus; Charles the First, his Cromwell; and George the Third . . . may profit by their example.

Patrick Henry, Speech to the Virginia House of Burgesses²

Be it declared and enacted by this present Parliament, and by the authority of the same: That the People of England, and of all the dominions and territories thereunto belonging, are and shall be, and are hereby constituted, made, established and confirmed to be, a Commonwealth or Free-State; and shall from henceforth be governed as a Commonwealth and Free-State,—by the Supreme Authority of this Nation the Representatives of the People in Parliament, and by such as they shall appoint and constitute officers

1. Ruden, McClosky, Smith, Schuster & Russell Professor of Law, Florida State University. My thanks to Chenell Garrido, Roman Ortega-Cowan, and Michael Rowan, my research assistants at Florida State, for their unfailing ability and enthusiasm. I am also grateful to Adam J. Hirsch, who read and commented extensively on a draft of this article, and Russell Pearce, who invited me to participate in this symposium and who offered useful guidance into the literature of the republican revival, to which he is himself a notable contributor.

In thinking and writing about republicanism, I have been particularly fortunate in two of my friends and colleagues. Mark Seidenfeld has developed a republican theory of administrative law. *See, e.g.,* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 Harv. L. Rev. 1512 (1992). Steve Gey has subjected the modern revival of civic republicanism to a rigorous left-liberal critique. *See* Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. Pa. L. Rev. 801 (1993). I am deeply indebted to both Mark and Steve for a decade and a half of conversation, not only on republicanism, but also very much in its spirit.

In thinking and writing about the seventeenth-century English Commonwealth, I have also been most fortunate—in the idiom of the Good Old Cause, “graciously blessed”—in my earliest academic mentor and role model, Dr. John Richard de Witt, an authority on the theology and history of the Commonwealth era. *See, e.g.,* J. R. de Witt, *Jus Divinum: The Westminster Assembly and the Divine Right of Church Government* (1969). What is more, he was the minister of my childhood church, where he brought the light of the Netherlands’ tolerant and learned Calvinism to the descendants of Scottish Presbyterians. We are now both kin and compatriots; he has married my mother’s first cousin, Jane Epps, and he now ministers to the First Presbyterian Church of Columbia, South Carolina.

2. Moses Coit Tyler, Patrick Henry 64-65 (1888).

and ministers under them for the good of the People, and that without any King or House of Lords.

Act of the House of Commons, May 19, 1649.³

Our gentleman of an English king became an enemy to the English nation; so that he ceased to be a king. Those capacities are inconsistent. No man can be a member of the state, and an enemy to it at the same time. Antony was never looked upon by the Romans as a consul, nor Nero as an emperor, after the senate had voted them both enemies. This Cicero tells us in his Fourth Philippic: "If Antony be a consul," says he, "Brutus is an enemy; but if Brutus be a saviour and preserver of the commonwealth, Antony is an enemy: none but robbers count him a consul." By the same reason, say I, who but enemies to their country look upon a tyrant as a king?

Did you not remember, that the commonwealth of the people of Rome flourished and became glorious when they had banished their kings?

John Milton, *A Defence of the People of England*.⁴

Sic Semper Tyrannis.

Motto, Commonwealth of Virginia⁵

INTRODUCTION

Quite appropriately, as symposium after symposium has had us look forward into the new millennium,⁶ Fordham, firmly anchored in

3. Thomas Carlyle, *Oliver Cromwell's Letters and Speeches with Elucidations* (3d ed. 1849) (quoting Commons Journals, May 19, 1649).

4. John Milton, *A Defence of the People of England, In Answer to Salamusius's Defence of the King*, in 2 *The Prose Works of John Milton* 54-55, 69 (Rufus W. Griswold ed., 1856).

5. Va. Code Ann. § 7.1-26 (1999). The great seal of the commonwealth containing this motto was adopted by the Virginia Constitutional Convention on July 5, 1776. Virginia General Assembly, *Emblems & Symbols*, at <http://legis.state.va.us/CapitolClassroom/9-12/9-12Emblems.htm> (last visited February 14, 2003).

6. See, e.g., Lisa Harrison, et al., *National Labor Policy in the New Millennium: The Impact of the Bush Administration*, 2001 M.S.U.-D.C.L. L. Rev. 1047; William P. Quigley, *Backwards into the Future: How Welfare Changes in the Millennium Resemble English Poor Law of the Middle Ages*, 9 Stan. L. & Pol'y Rev. 101 (1998); Symposium, *Fifty-Seventh Judicial Conference of the Third Circuit: Looking Forward to the Next Millennium*, 70 Temp. L. Rev. 1081 (1997); Symposium, *Religious Liberty at the Dawn of a New Millennium*, 75 Ind. L.J. 1 (2000); Symposium, *United States Immigration Policy at the Millennium*, 113 Harv. L. Rev. 1889 (2000). Not surprisingly, my hosts at Fordham have also marked the millennium with a look forward as well as back. Mary C. Daly, et al., *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, 58 Law and Contemp. Probs. 193 (1995).

the grand Jesuit tradition of liberal learning,⁷ has us looking back. We need to be reminded, as the *Fordham Law Review* is reminding us, that looking back is not necessarily conservative, much less backward. It is, rather, a prerequisite of radical re-orientation; “radical” is, literally, getting back to roots. The root of “radical,” “radix,” is the ordinary Latin word for garden variety roots—radishes, for example. This essay takes us back to the Latin roots of radicalism in law and politics. In keeping with the theme of this year’s symposium, this article suggests that the most significant development, for both our legal system in general and our legal ethics in particular, has been the founding of the Roman Republic and the subsequent development, through continual revival and revision, of the republican tradition. And this article reminds us that a critical stage in that development, perhaps the most vital in Anglo-American history and law, was the seventeenth-century Commonwealth of England.

The story of the recent Republican Revival in legal scholarship is itself now more history than news,⁸ although reports of its death may have been exaggerated.⁹ Others have told that story in more detail than this essay could accommodate¹⁰ and with more expertise than this author can claim.¹¹ This article focuses on several related aspects of that Revival, those that are relevant to law in general and legal ethics in particular. We need to look first at what was re-discovered. For our purposes, it is important to see why legal scholars went looking to the past in the first place, and why they liked what they saw. This attraction to republican history is especially important in light of criticisms of the Revival, often led, ironically enough, by historians,

7. See generally John W. O'Malley, *The First Jesuits* (1993).

8. See Nomi Maya Stolzenberg, *A Book of Laughter and Forgetting: Kalman's "Strange Career" and the Marketing of Civic Republicanism*, 111 Harv. L. Rev. 1025, 1025 (1998) (book review) [hereinafter *Civic Republicanism*] (“In the mid-1980s, it was still breaking news in the legal academy that the Lockean tradition of classical liberalism and individual rights was not the only conception of politics to have shaped the ideas and actions of American political actors and lawmakers.”).

9. *Id.* at 1038 (quoting Kalman as expressing the “intention of ‘putting the final nail in the coffin’ of civic republicanism in legal theory”).

10. The magisterial account, which covers the Republican Revival and much else besides, is Laura Kalman, *The Strange Career of Legal Liberalism* (1996). See Stolzenberg, *Civic Republicanism*, *supra* note 8, at 1040 (noting that “Kalman’s descriptive flair and her near-encyclopedic coverage of the major works, as well as a staggering number of the lesser ones, produced during this period accurately conveys the spirit” of legal academia from the late 1970s through the early 1990s).

11. I say that without any particular humility; one of the more interesting aspects of the Republican Revival has been the dispute, which ranges across the whole of legal scholarship, about the qualifications of legal academics to operate outside our field (however that field is defined). On cross-disciplinary legal studies generally, see Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 Yale L.J. 1059 (1999). On the particular problems with legal scholars’ borrowing from historians, see Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 Colum. L. Rev. 523 (1995); see also Kalman, *supra* note 10 at 167-90; Stolzenberg, *Civic Republicanism*, *supra* note 8, at 1025-39.

some of whom actually made some of the original re-discoveries. There may be more in that history, and less, than we have realized—less, in the way of operable guidance in the interpretation of the Constitution, but more, and much more importantly, in the way of materials from which to construct a fuller program of legal reform. Critics have said that the contemporary revival of the republican tradition has raised more questions than it answers; this article suggests that the republican tradition answers more contemporary questions than either its revivers or their critics have realized.

This article looks first at what the Revival was looking for, and purported to find; second, at what its critics said, with considerable force, that its proponents were missing; and, finally, at what else the Republican tradition offers, beyond both what its proponents hoped for and what its critics found wanting. Republicanism can both fulfill its promise and answer its critics, but only by becoming more familiar with, and more faithful to, the republican tradition. To the extent that republicanism becomes more republican it may well lose some of its present adherents. But it may, at the same time, gain many who never thought of themselves as fellow-travelers. Their re-patriation will be well worth its price.

Before we turn to those specifics, we need to examine, albeit only briefly, our millennial perspective. That perspective, whether directed forward or back, is doubly out of focus with respect to the republican tradition. For one thing, it doesn't take us back nearly far enough; the traditional year for the founding of the Roman Republic is 510 B.C.E., fully half a millennium before our own mathematically problematic Year One.¹² By then, the Republic was, in all but form, already gone. Luke's Gospel records that Jesus was born during the reign of Caesar Augustus, in the year of the first imperial census, when Quirinius was Roman governor of Syria.¹³

These very modes of reckoning time themselves suggest the second problem with our recent millennial fascination. What we politely designate today as B.C.E., "before the common era," was, until quite recently, almost universally called simply "B.C.," the abbreviation for "Before Christ." And dates in our own era were denominated then, as they sometimes are even now, as A.D., "Anno Domini," Latin for "in the year of our Lord." That "lord," of course, was and is understood to be Jesus, whom Christians regard as God incarnate, lord of time and the universe.¹⁴

12. See Joyce Carol Oates, *The Calendar's New Clothes*, N.Y. Times, Dec. 30, 1999, at A27 (pointing out that "the millennium per se won't begin until the eve of 2001").

13. Luke 2:1-2.

14. See William Safire, *B.C./A.D. or B.C.E./C.E.*, N.Y. Times, Aug. 17, 1997, § 6 (Magazine), at 22.

Paradoxically, we in the modern and secular West reckon our common time from a sectarian, religious date. Even in our own American Republic, with its constitutional disestablishment of religion, the watershed of world history is taken to be the most sacred day of a single, albeit large and powerful, religious sect. The Roman Republic, by contrast, reckoned its public time from a secular date with primarily, if not purely, political significance: *ab urbe condita*, from the establishment of the city, in 753 B.C.E.¹⁵ This contrast should put us appropriately on notice: even by our own standards, in something as basic as the measuring of public time, our ancient Roman Republican predecessors may have been ahead of us.¹⁶

This is not, of course, to suggest that our republic is less laudable than theirs. That would be absurd, even perverse. It is, rather, to suggest that our republic, with its tradition of toleration and the rule of law, owes more than we typically acknowledge to the much older republic at Rome. And, as we enter our own era of world pre-eminence, perhaps even leadership, they may still have much to teach us; as we teeter on the brink of war, we may even learn from them about keeping the peace.

I. THE PROMISE OF THE RECENT REPUBLICAN REVIVAL: WHAT THE REVIVAL SOUGHT, AND CLAIMED TO FIND, IN THE REPUBLICAN TRADITION

Fascination with the Roman Republican tradition is a perennial phenomenon in the West; it first arose even as the Republic itself was falling.¹⁷ It was, of course, a significant part of the epoch we know as

15. Steve Strunsky, *Time for the Countdown*, N.Y. Times, Dec. 26, 1999, at 14NJ6. This was, accordingly, the Latin title of Livy's History of Rome: *Ab Urbe Condita* (Oxford Classics, Vol. I, Robert Maxwell Ogilvy ed., 1974).

16. Our sibling republic, France, tried a Roman-style republican calendar, reckoning time from the founding of the new regime in 1792 B.C.E., Year One of the Republic. But the new regime proved particularly unstable, not to mention bloody, and the calendar went out with France's first republican experiment. As any political science text will tell you, they are now working with republic number five.

17. See Livy: A History of Rome: Selections 17 (Moses Hadas & Joe P. Poe trans., 1962) (prefacing his history of Rome's ancient and republican past, written in the Augustan era, with the consolation that "it will distract me from the melancholy spectacle our age has been witnessing these many years"); Moses Hadas, *Introduction to The Complete Works of Tacitus* ix, xix (Alfred John Church & William Jackson Brodribb trans., Moses Hadas ed., 1942) (describing Tacitus as "an aristocrat with a nostalgic admiration for the Republic and contempt for a populace and a nobility alike corrupted by slavery"). These writers, in turn, were a principal inspiration for Americans of the Revolutionary period.

What gripped their minds, what they knew in detail, and what formed their view of the whole of the ancient world was the political history of Rome from the conquests in the east and the civil wars in the early first century B.C. to the establishment of the empire on the ruins of the republic at the end of the second century A.D., [for which knowledge they relied on] Plutarch, Livy, and above all Cicero, Sallust, and Tacitus—writers who had

the Renaissance. The most recent phase of that fascination, the Republican Revival of the last decades of the last century, has looked back particularly to that early modern revival. What we need to see in this section is what its proponents were looking for, when they began to look back, and why. To pose those questions is not to join their critics in denouncing the tendentiousness of their inquiry.¹⁸ It is, rather, to lay a better foundation for answering their critics and expanding their program in Parts II and III.

A. Substance

Most basically, and most explicitly, contemporary scholars who turned to the republican tradition were looking for a middle way in modern political and legal thought between individualism and communitarianism. As a leading republican political theorist put it, he and his fellows have been seeking "a social philosophy that is at once anti-collectivist and anti-atomist."¹⁹ In legal theory, the shoals to steer between were, on the right, original-intent schools in constitutional law²⁰ and the more general law and economics movement, and, on the left, neo-collectivisms like the Critical Legal Studies movement.²¹ In legal ethics, republicanism offered a means of striking a better balance between duty to client and duty to the public, which leftist scholars believed the dominant mode of lawyering, neutral partisanship, had struck far too much in the direction of client interest.²²

Classical—or, more precisely, neo-classical²³—republicanism offered just such a middle way. On the one hand, republicanism

lived either when the republic was being fundamentally challenged or when its greatest days were already past and its moral and political virtues decayed.

Bernard Bailyn, *The Ideological Origins of the American Revolution* 25 (1967).

18. See Stolzenberg, *Civic Republicanism*, *supra* note 8, at 1033-37 (describing charge of "presentism" raised against civic republican legal scholars); *id.* at 1063-64 (analyzing the circularity of the charge).

19. Philip Pettit, *Republicanism: A Theory of Freedom and Government* vii (1997); see also Kalman, *supra* note 10, at 159; Stolzenberg, *Civic Republicanism*, *supra* note 8, at 1033 (identifying this desideratum of the Republican Revival).

20. See Flaherty, *supra* note 11, at 528 ("Theorists such as Richard Epstein, committed to at least one version of foundational rights, claim to look at the American past but see little more than John Locke."); Kalman, *supra* note 10, at 8 ("The discovery by liberal legal scholars of an eighteenth-century republicanism they can attribute to the Founders responds to the exaltation by conservatives of 'original intent.'").

21. Stolzenberg, *Civic Republicanism*, *supra* note 8, at 1039.

22. Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 Md. L. Rev. 255, 258-66 (1990); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. Rev. 1, 11-19 (1988); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 Geo. J. Legal Ethics 241 (1992).

23. As we shall see, the viability of this distinction is one of the more salient questions critics of the Republican Revival have raised. See Gey, *supra* note 1, at 804

B. Form

The republican tradition offered its latter-day adherents a related set of advantages that had less to do with its specific content, and more to do with its preferred processes and its particular history. Like its content, these more formal advantages also helped place the Republican Revival between contemporary movements on both the left and the right.

1. Republican Process

As we have seen, classical republicanism emphasized not only the rule of law, but also the rule of a kind of law that was both humanitarian in its purpose and human in its origin. This latter insistence on the humanness of law, and of norms more generally, suggested that republicanism might survive post-modern meta-normative critiques of foundationalism while at the same time retaining modernist, left-liberal values. Republican norms could plausibly be said to rest, not on the kind of transcendent, objectively valid foundation that post-modern thought largely rejected, but on the more comfortably contingent and this-worldly base of popular will, articulated through deliberative politics.³¹

On the other hand, over against right-liberal, pluralist notions of how that popular will is to be expressed, republicanism offered the meta-value of meaningful citizen participation in self-government. Inseparable from republicanism's dual commitment to individual liberty and public welfare, on this view, was its insistence on active citizen participation in government. Only in that way is individual liberty meaningfully realized, and only in that way is the state both limited in its interference with liberty and sustained in its direction toward the public good. The public good, in turn, cannot be seen as the summation of private preferences; it must be something more, something shaped and re-shaped in meaningful and public dialogue.

2. Republican History

If the republican tradition had not offered moderately leftist theorists this enviable combination of features, both formal and substantive, surely they could have invented it. Indeed, their critics have alleged that they did in fact create it to meet their current needs, only afterward grafting it onto pre-existing stock.³² And at least some

31. See Kalman, *supra* note 10, at 101-31 (describing "crisis" posed to legal theorists by anti-foundationalism); *id.* at 143-47 (describing appeal of civic republicanism as a response); *id.* at 158-59 (noting that the legal scholars "Michelman and Sunstein saw their own republicanism as an effort to steer between objectivism and irrationalism"; see also Stolzenberg, *Civic Republicanism*, *supra* note 8, at 1043-44 (summarizing Kalman).

32. See Stolzenberg, *Civic Republicanism*, *supra* note 8, at 1045-46.

of the chief civic republican theorists seem satisfied with the theory's present viability, irrespective of its historical pedigree;³³ they did not care whether they had re-invented rather than re-discovered the republican wheel, so long as it bore their contemporary load. But many, if not most, have taken particular comfort in its history, either in the republican tradition as a tradition, or in republicanism's reaffirmation that ideas matter in both history and law.

a. *The Power of a Proper Pedigree*

At least two components of the recent Republican Revival, constitutional law scholars and legal ethicists, have found the history of republicanism itself to be attractive.

i. Constitutional Law Scholars

First and foremost among the historically oriented neo-republicans, at least chronologically and numerically, were left-liberal constitutional law scholars. Faced with the forceful revival of right-liberal "originalism" in both the courts and the academy, they were pressed to find alternatives to Locke and libertarianism in the generation of the Founders. Claiming to follow historians of the period—a claim challenged, as we shall see, by those historians themselves—constitutional law theorists purported to find strongly republican strands deeply woven into the Constitution itself, a public welfare warp to the right-liberal's individual rights woof.³⁴ Tracing those republican, welfarist threads forward, they have tried to weave contemporary patterns,³⁵ patterns that their right-liberal opponents tended to dismiss as ill-fitting patches on the constitutional fabric, if not whole-cloth modern innovations.

ii. Legal Ethicists

Reformist scholars faced a parallel problem with conservatism in the field of legal ethics. As we have seen, the dominant theory of legal ethics in the late twentieth century, neutral partisanship, posed a

33. See, e.g., Seidenfeld, *supra* note 1, at 1512.

34. Kalman, *supra* note 10, at 132-63; see Morton J. Horowitz, *Republican Origins of Constitutionalism, in* *Toward a Usable Past: Liberty Under State Constitutions* 148-49 (Paul Finkelstein and Stephen E. Gottlieb eds., 1991) ("As liberalism has increasingly accepted an interest group pluralist picture of the world, the republican revival has sought to rediscover a communitarian tradition that emphasized notions of public-spiritedness and public interest and also emphasized that there was a normative element to law, not just a neutral framework for managing traffic and facilitating private ordering."); Stolzenberg, *Civic Republicanism*, *supra* note 8, at 1043-44.

35. See, e.g., Frank Michelman, *Law's Republic*, 97 Yale L.J. 1493 (1988) (discussing *Bowers v. Hardwick*).

powerfully rights-based, individualist version of the lawyers' role. More publicly-oriented alternatives abounded in the post-Watergate era, but were subject to attack, not so much on their merits, as on their genealogy. One of their more prominent and vocal critics, for example, suggested that any diminution of zeal for one's client out of consideration for the commonweal was more suitable to regimes like Castro's Cuba and Iron-Curtain Bulgaria than to our own traditions of limited government and individual liberty.³⁶ Looking backward, reformist legal ethics scholars were able to show not only that neutral partisanship was a distinctly late nineteenth-century development, but also that explicitly republican models of lawyering lay much deeper in the traditions of the American bar.³⁷

b. *The Advantages of (Limited) Ideological Autonomy*

In addition to an appealing historical foundation, republicanism also offers a middle way through current debates about the autonomy of law and the role of ideas in history. On the one hand (which has tended to be the left hand), the revival of interest in the vitality of the republican tradition shored up concerns that ideas can function in law or other social systems in any way independently of deeper, more basic forces—whether, in law or elsewhere, ideas can ever function as reasons for human actions, rather than as rationales, conscious or unconscious. In the wake of Nietzsche, Freud, and Marx, a host of leftist cultural historians, critical legal scholars, and post-modernists of myriad stripes all suggested that ideas are mere epiphenomena properly reducible to more basic elements, whether social, economic, sexual, or psychological.³⁸ Recent scholarship on the historical vitality of the republican tradition promised to stem, or at least slow, this reductionist tide, a tide particularly problematic for scholars of law.

On the other hand (mostly the right), interdisciplinary legal scholars have long faced a largely rear-guard attack on the whole range of “law-and-,” from the most mathematically rigorous law and economics to the most belle-lettrist law and literature.³⁹ On this view,

36. See Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. Pa. L. Rev. 1060, 1063 (1975).

37. See Stolzenberg, *Civic Republicanism*, *supra* note 8, at 1027, 1031; *supra* text accompanying note 23 (citing work of Gordon and Pearce).

38. See Kalman, *supra* note 10, at 172 (“Seeing the potential of ideology to revive a social history drained dry of politics at a time when historians worried about the survival and continuing significance of their discipline, some historians fell on ideology as the solution to their field’s problems” and were particularly drawn to republicanism’s emphasis on ideology.); Flaherty, *supra* note 11, at 534, 535-36 (describing marginalization of constitutional history by social history); Stolzenberg, *Civic Republicanism*, *supra* note 8, at 1027 (“This republican synthesis elevated ideas, values, and belief systems from the status of epiphenomena . . . to the status of major protagonists in history.”).

39. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the*

which might fairly be called paleo-Langdellian, law is a self-contained, autonomous discipline with its own distinct subject matter and methodology. As such, it has nothing to gain, and much to lose, by borrowing from neighboring disciplines.⁴⁰ The revival of the republican tradition by legal scholars, entailing as it necessarily did extensive borrowings from the allied disciplines of history and political and cultural theory, thus drove another stake into the heart of Langdellian orthodoxy (or, more likely, merely cut another serpent from that hydra's head).

II. PROBLEMS WITH THE REVIVAL: SINS OF OMISSION AND COMMISSION

Critics of the republican revival, perhaps predictably, were quick to appear.⁴¹ This section considers two kinds of critiques: that republicanism contains normatively undesirable elements, or that, without those elements, republicanism cannot be practically implemented. We shall see how republicans might respond to these critiques, both more adequately than they yet have, and more consistently with republicanism's own traditions than its present proponents seem to have believed possible. Sometimes this defense will invoke history, but only in a descriptive way—to say what republicanism has been able to do in its past, and to say what bad elements of its past can be avoided in its future. This, however, will leave open a serious normative gap, which can only be filled by turning to republican history in a different, more normative way.⁴²

A. Substance and Process

A recent defender of the republican revival has noted a peculiar paradox in the position of its critics, which she nicely captures under the heading “Civic Republicanism Didn't Exist, and it's a Good Thing, Too.”⁴³ On the one hand, critics fault the republican revival for having so vague and protean a content as to be vacuous; on the other hand, they fault its substantive position for being, if not entirely clear, then clear enough to be clearly wrong, and wrong in multiple ways (normative, descriptive, and methodological).

Legal Profession, 91 Mich. L. Rev. 34 (1992).

40. See David Luban, *Against Autarky*, 34 J. Legal Educ. 176 (1984) (describing and criticizing this view).

41. See Stolzenberg, *Civic Republicanism*, *supra* note 8, at 1029 (“The great popularity among law professors of the republican school of historiography gave rise to complaints about its faddishness, a charge calculated to embarrass the proponents of the so-called ‘republican revival’ in law.” (citation omitted)).

42. See *infra* Part III.A.2.

43. See Stolzenberg, *Civic Republicanism*, *supra* note 8, at 1039.

1. Badly Unclear

It is often said, in general, that republicans disagree about their core principles, and that, when they do agree, it is only on vague generalities.⁴⁴ Here we hear an echo from the founding era itself; as John Adams observed, by “republic” one can mean “anything, everything, or nothing.”⁴⁵ More particularly, critics charge that republicans badly blur the line between their own position and that of liberals, especially left-liberals,⁴⁶ and obscure the historical overlap of liberal and republican thought.⁴⁷

As to the second of these objections, Holmes’s proverbial ounce of history is relevant here: As we have seen, most civic republicans *were* left-liberals. The greater surprise would be, not that their program was not readily distinguishable from left-liberalism, but that it was.⁴⁸ The remainder of this section and the next shows that the relationship may be closer than even republicanism’s critics suppose. For one thing, republicanism may give a better account of some left-liberal positions than left-liberalism itself; the quest for that account, as we have seen, is what pressed many of the Revival’s principle architects in the direction of republicanism. To see whether they deliver on that promise, we must turn to the central tenets of republicanism and to left-liberal criticisms of each.

What of the more general charge, that republicanism is too amorphous to count as a movement? This charge itself has several related aspects. At one level, it may mean little more than that civic republicanism is a “broad church,” “big tent” movement; to that extent, it is a criticism that republicans can accept with more pride than embarrassment.⁴⁹ But is the breadth so great as to leave no

44. See generally Kalman, *supra* note 10, at 179; Michael P. Zuckert, *Natural Rights and the New Republicanism* 151 (1994) (“The ‘republican synthesis’ [among historians of the American Revolution], in a word, is not so monolithic as to deserve the appellation ‘synthesis.’”).

45. Zera S. Fink, *The Classical Republicans: An Essay in the Recovery of a Pattern of Thought in Seventeenth-Century England* viii (2d ed. 1962) (quoting John Adams); see also Kalman, *supra* note 10, at 174 (noting that historians “became fond of quoting John Adams’s observation that there ‘is not a single more unintelligible word in the English language than republicanism.’” (citation omitted)).

46. See Stolzenberg, *Civic Republicanism*, *supra* note 8, at 1044-45.

47. Kalman, *supra* note 10, at 174 (“Some historians also questioned the relationship between liberalism and republicanism,” asking “[w]as it sound, as a matter of historical interpretation, to oppose them?”).

48. See Sunstein, *The Idea of a Useable Past*, 95 *Colum. L. Rev.* 601, 605-06, 606 n.23 (arguing that republicanism is not properly distinguished from liberalism, but from “interest-group pluralism and conceptions of politics that see protection of private rights as the sole purpose of constitutional structure”).

49. See Horowitz, *supra* note 34, at 149-50 (“We should not unselfconsciously propagate the view that republicanism is just one thing.”); *id.* at 150 (arguing that “there were many ambiguities, many complexities, many contradictions in republican ideology in 1789” and that “[w]e should try to preserve that richness”); see also Zuckert, *supra* note 44, at 151 (“The ‘republican synthesis’ [among historians of the

content to criticize? On that score, we can simply let one set of critics answer the other. Some critics, as we shall see in the next subsection, have found more than enough shared substance to fault.⁵⁰

2. Clearly Bad

To analyze the claim that republicanism is clearly bad, let us begin with this distillation of civic republican principles, from the laboratory of my anti-republican colleague, Steven Gey: "In one sentence, civic republicans argue that the constitution provides the framework for an organic community composed of socially constructed individuals, who join together in government to identify and pursue civic virtue."⁵¹ Professor Gey's definition can be faulted for focusing too narrowly on the present United States Constitution; in that respect he is simply letting civic republicans define their field. But for present purposes his definition nicely isolates three related elements common to all versions of revived republicanism: civic virtue, organic community, and the social construction of the individual. With respect to each, this section examines the critics' position and the responses that republicans have made, or could have made.

a. *Civic Virtue*

Critics of republicanism, including Professor Gey, sometimes imply that republicanism is alone in its reliance on civic virtue, which they see as silly or scary, or both. This is due partly to the explicitness of republicanism's reliance on civic virtue, and partly to ambiguity in the term "civic virtue" itself. To take the definitional problem first, both parts of the term need unpacking. The "virtue" civic republicans invoke is not the sort of saccharine Victorian sanctimoniousness that the term has sadly come to suggest.⁵² Nor need it be sexist, as its linguist link with virility might imply. The scope of virtue, in the classical sense, is limited to neither machismo nor human sexual mores. As its Greek equivalent *arête* better suggests to modern ears, virtue in the republican tradition has to do with the specific excellence of a thing at its most essential task or function. Thus Socrates spoke

American Revolution], in a word, is not so monolithic as to deserve the appellation 'synthesis,'" although "[t]he discovery of republicanism is of undeniable importance, for it can help us understand the new republicanism of the American order . . .").

50. Part III, where this article considers the relationship of republicanism to history, takes up a final aspect of this criticism, the charge that modern republicanism cannot claim proper descent from classical or Renaissance republicanism.

51. Gey, *supra* note 1, at 806.

52. For an account of the demise and revival of virtue ethics, see Alasdair MacIntyre, *After Virtue* (1981). For a more recent survey of virtue ethics, see *Virtue, Nomos XXXIV* (John W. Chapman and William A. Galston ed., 1992).

of sharpness as the virtue of knives, and swiftness as the virtue of horses.⁵³

For the Romans, as for the Greeks, identification of the specific excellence, or virtue, of human beings was both more complex, and more critical. Whatever else it involved, it had a necessarily social, even political, component, because they viewed humans as essentially social and political beings. Thus all political communities, not just republics, require political, or civic, virtue.⁵⁴ Minimally, civic virtue must be those qualities of character in the citizen that make the community possible; optimally, those qualities that make the community flourish. The kind of civic virtue republics require is more properly seen as republican virtue. For present purposes, it can be narrowed down quite nicely to this: minimally, citizens' willingness to accept and defend a polity based on republican principles; optimally, meaningful citizen participation in the public specification and elaboration of human excellence itself.

Minimal civic virtue would require that citizens at least be willing and able to inform themselves about matters of public importance. They need not be informed enough to debate these issues directly, but only enough to choose representatives who can. And, less happily, minimal civic virtue also requires that citizens be willing to defend the republic against overthrow or conquest. It is important to note, however, that the citizen's role in civil defense, like the citizen's role in political deliberation, need not be direct. Republican armies must be under civilian control, but they need not include all citizens—or, indeed, any citizens.

It is sometimes objected that the civic virtue of republicanism somehow implies militarism.⁵⁵ To be sure, some republics, ancient and modern, have seen citizen armies as schools of civic virtue, particularly patriotism and common purpose. But there are doubtlessly other schools, and other means of schooling, where the values of fraternity and equality are conveyed with less of a loss in liberty. Republicans, indeed, steeped as they tend to have been in the history of ancient Rome, have traditionally had a deep-seated distaste for standing armies, particularly mercenary armies.

53. See Plato, *The Republic* 32-33 (Allan Bloom trans., 1968) ("‘All right,’ I [Socrates] said, ‘does there seem to you also to be a virtue for each thing to which some work is assigned?’"); see also Aristotle, *The Nicomachean Ethics* 41 (Martin Ostwald trans., 1962) ("It must, then, be remarked that every virtue or excellence (1) renders good the thing itself of which it is the excellence, and (2) causes it to perform its function well.").

54. Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 Cal. L. Rev. 329, 390 (1994) (citing Aristotle's *Politics* for this point).

55. See Gey, *supra* note 1, at 804 n.5; Stolzenberg, *Civic Republicanism*, *supra* note 8, at 1045 (noting charge that classical republicanism "is necessarily enmeshed with the values and institutions of patriarchy, militarism, and various other forms of domination and exclusion").

A republic, then, need not pattern itself on the universal military service of contemporary Switzerland or Israel, the one mostly for acculturation, the other mostly for survival. Much less need it follow the pattern of ancient Sparta or modern Prussia. The republic can (and, in accord with republican preference for deliberation, should) see war as a necessary evil forced upon its citizens by their enemies, not as a glorious enterprise expressive of its own dearest values. Its motto as to things military should be that of Oliver Cromwell: War for peace. And this motto need not be given an Orwellian reading. It need only mean that a republic must have a military to defend itself against external enemies.⁵⁶

As republican civic virtue does not imply militarism, neither does it imply intolerance, political, social, or cultural.⁵⁷ Contrary to what allusions to the French Jacobins' Republic of Virtue are designed to suggest,⁵⁸ republicanism does not require that those lacking in civic virtue will be persecuted, much less extirpated or exterminated.⁵⁹ The republic, to be sure, must enable virtue, and may in fact affirmatively instill it, but need not demand or require it to the same extent in all citizens, or to the optimal extent in any citizen. Those less committed to republican values may meditate or fast or pray in the privacy of

56. Though the republic could—I would say should—also have a military adequate to extend its benefits to future citizens in foreign lands as yet unfree.

57. Cf. Horowitz, *supra* note 34, at 152 (asserting that “[w]e are going to have to face squarely and directly the very limited version of pluralism that was contained within the republican tradition” and that “the liberal individualistic tradition produces the ideology for tolerating difference”).

58. See, e.g., Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. Chi. L. Rev. 225, 230 (1992).

We have now, as we have had since the time of the Jacobins, a determined band of intellectuals, politicians, and publicists enraged that human material is recalcitrant to their projects to level the condition of all men in the equal service of their particular visions of community. . . . The partisans of equal subordination to the claims of politics have always been driven to crush what stood in their way: religion, talent, property, science, and most of all, liberty. *Id.*; see also Rob Atkinson, *Lawyering in Law's Republic*, 85 Va. L. Rev. 1505, 1524 (1999) (book review) (“Civic republicans of all stripes need reminding that the danger of facilely enforced consensus is not peculiar to *The Republic*: When those with long historical memories think of the Republic of Virtue, they have in mind not Plato, but Robespierre.”); Horowitz, *supra* note 34, at 151 (“The most ominous strand in the republican tradition is contained in the widely held view that the only way to have a free society is to have a relatively homogenous social base.”).

59. See Miriam Galston, *supra* note 54, at 379, 382 (noting that “[c]lassical republican thought includes a theory of civic virtue that ranges from unappealing to terrifying to many contemporary legal theorists,” but raising “the possibility that the civic virtue presupposed by a deliberative democracy differs from the civic virtue presupposed by classical republican theory in ways that would make contemporary civic virtue less objectionable than classical civic virtue”); William A. Galston, *The Use and Abuse of the Classics in American Constitutionalism*, 66 Chi.-Kent L. Rev. 47, 64-65 (1990) (same); cf. Gey, *supra* note 1, at 808 (“[T]he civic republican view of government seems to mandate that the government must discourage and even punish civic vice.”).

their study, ashram, or asylum; they may amass their wealth through factory, field, or finance, all unmolested by the republic. The republic will not call their ways equally virtuous, but it need not require them to change their ways, nor need it require much from them to sustain its own.

All the republic must have is a minimum of civic virtue, in two reciprocal senses. Its citizens themselves must embody and practice its virtues enough, and it must have enough such citizens, to ensure that its internal order of citizen self-government functions, that it can defend itself against foreign foes, and that its values are passed on to the next generation. That minimum core of minimally virtuous citizens is the civic republican's second essential element, an organic community.

b. *Organic Community*

Civic virtue, as we have seen, implies a community in which the citizen is virtuous, a community in terms of which civic virtue is defined and toward which civic virtue is directed. The republican community must be organic, at least in the sense that all citizens can participate meaningfully in the articulation of public values, including civic virtue itself. From this republican commitment to meaningful dialogue among citizens about the content of civic virtue, its critics infer several problems.

For one thing, these critics tend to insist, as did critics of the Founders, that genuine republics must be small, face-to-face communities ideally as small as the ancient Athenian *polis* or the stereotypical New England town, but in any case not of transcontinental scope. And civic republicans' vaguer and more rhapsodic accounts of citizen participation do seem to imply casual conversations among neighbors up on the Acropolis, down at the general store, or perhaps over coffee at Starbucks. However desirable this hominess may strike even republicanism's critics,⁶⁰ it is hardly necessary for a modern republic.

The Founders may well have wondered whether a republic could span as great a space as America's eastern seaboard, given limits of eighteenth-century transportation and communication. But we need not worry now, in the age of jet transport, communication satellites, and the worldwide web. Nor should we forget what Milton said about Rome: it reached the heights of its glory, not as an empire, but as a republic. And it was republican Rome, not democratic Athens, that the Founders took as their principal model.⁶¹

60. See Gey, *supra* note 1, at 815 (faulting civic republicanism for "failing to recapture the old system's one real advantage—its homey, personal, face-to-face means of identifying and achieving common goals").

61. See Richard M. Gummere, *The Classical Ancestry of the United States*

Other critics worry that the republic's insistence on meaningful participation implies, not that the republic must be geographically small, but that it must be demographically exclusionary. Earlier republics notoriously limited the franchise and other benefits of full citizenship on the basis of property ownership, educational level, or overtly invidious factors like sex, race, or religion. Perhaps, at some level of social and economic development, it was simply impossible for all adult members of the relevant national populations to qualify for meaningful political participation;⁶² perhaps earlier republican theorists and practitioners were more conservative in extending full citizenship than meaningful participation would really have required.

Nothing in this sad side of republican history, however, requires that modern republicanism follow the path of exclusion to the goal of meaningful participation.⁶³ At our present levels of wealth and our present understanding of human potential, the opposite path, inclusion, is clearly possible: insist that the republic give all its citizens the wherewithal to participate fully in all aspects of economic and political life. This would have three principle elements: first eliminate any remaining vestiges of invidious discrimination; second, provide all children of the republic a free and full education;⁶⁴ and finally, guarantee all citizens a secure starting place and safety-net in the economy of the commonwealth. This last would include not only the social insurance acceptable even to such right-liberals as F.H.A. Hayek,⁶⁵ but also the "new property" outlined a generation ago by left-liberal Charles Reich⁶⁶ and embodied in the economic opportunity legislation of Lyndon Johnson's Great Society.⁶⁷

Constitution, Am. Q., Spring 1962, at 3, 16 (discussing the need perceived by Madison and others for a strong senate similar to that which was found in Rome so as to avoid the "popular fluctuations" that plagued Athenian democracy); Edwin A. Miles, *The Young American Nation and the Classical World*, 35 J. Hist. Ideas 259, 263 (1974).

62. See Miriam Galston, *supra* note 54, at 397.

[I]f Aristotle did not exclude certain classes of people from citizenship because they were intrinsically incapable of citizenship, but only as a means to ensure an end that can be accomplished today without resorting to such drastic measures, then many of the exclusionary aspects of his political thought would be instrumental and not choiceworthy in their own right.

Id.

63. See Morton J. Horowitz, *supra* note 34, at 150 ("Nevertheless, if one keeps all the dangers in mind, there are ways to understand, from the perspective of a contemporary egalitarian, the richness of the republican tradition," at least one version of which contained "a very powerful commitment to political equality.").

64. See *infra* at Part II.A.2.C.

65. Friedrich A. Hayek, *The Road to Serfdom* 119-20 (1962).

66. Charles A. Reich, *The New Property*, 73 Yale L.J. 733 (1964); see also William H. Simon, *Social-Republican Property*, 38 UCLA L. Rev. 1335 (1991) (describing a property theory between classic liberalism and socialism, based in part on the republican tradition).

67. Economic Opportunity Act of 1964, Pub. L. No. 88-452 (codified as amended at 42 U.S.C. §§ 2701 (repealed 1981); see 42 U.S.C. § 2861 ("[T]he purpose of this part is to assist migrant and seasonal farmworkers and their families to improve their living

What's more, nothing inherent in republicanism requires that republican citizenship stop at traditional national frontiers. As its citizenship can be extended downward domestically, so it can be extended outward internationally. Classical republicanism, indeed, is at once pre-nationalist and potentially anti-nationalist, even globalist. Rome, as Milton reminds us, was a territorial empire long before it became a political empire. And Rome, we should remember, was not only a multi-national, but also a multicultural empire, willing, even eager, to extend its citizenship to loyal non-Latin elites under its dominion.

Consider a singular, but not single example, Paul the Apostle. Born a Roman citizen in the city of Tarsus in modern Turkey,⁶⁸ Paul never saw any incompatibility between that citizenship and his membership in various Jewish religious sects, first the orthodox Pharisees, then the heterodox Christians. Nor did he feel any compunction about invoking imperial law, with apparent efficacy, against a wide range of antagonists: prison guards in the Roman colony of Macedonia,⁶⁹ local rulers⁷⁰ and Roman authorities⁷¹ in the semi-autonomous kingdom of Judea. And the republican historian Tacitus, disheartened by the decline he perceived in classical republican virtue in the early days of the empire, was more than happy to find many of those very virtues in Rome's mortal enemies, the Germans.⁷²

Republican expansion, of course, has historically had a darker side. Rome undeniably expanded by conquest, first the region of Latium, then the whole of the Italian peninsula, and, ultimately, the better part of the known world. Some critics, accordingly, fear that republics are inherently imperialistic. Like the related charge that republics must be militaristic at home, this one has little merit.

For one thing, it is more a strength than a weakness of republican values that they know no national bounds, even as they know no racial or gender constraints. And even if republics, founded on such

conditions and develop skills necessary for a productive and self-sufficient life in an increasingly complex and technological society."); *id.* § 2862(b)(1) (providing for "day care for children, education, health services, improved housing and sanitation . . . , legal advice and representation, and consumer training and counseling").

68. *Acts* 22:3.

69. *Acts* 16:37 ("But Paul said to them [the magistrates], 'They have beaten us publicly, uncondemned, men who are Roman citizens, and have thrown us into prison; do they now cast us out secretly?'") (RSV).

70. *Acts* 23 (describing Paul's rescue by a contingent of Roman soldiers from an ambush planned by local authorities in Jerusalem).

71. *Acts* 25:10-12, 26:30-32 (describing Paul's successful appeal to Festus, Roman procurator of Judea, that he be tried by Roman imperial law rather than local Jewish law).

72. *But see* Hadas, *supra* note 17, at xii ("It is a temptation to which many have succumbed to look upon the *Germania* as a sort of Utopia, a conscious idealization of a primitive and unspoiled people calculated to chasten and reform the decadent Romans.").

universalizable principles, are inherently expansionist, their mode of expansion need not be wars of aggression. Nor need their expansionism spring either from the economic imperative that Lenin saw at the root of imperialism or from the “white man’s burden” that more sanctimonious modern Europeans saw as justifying their overseas excursions. Rather, the republic’s conflicts can be wars of liberation, not conquest, its imperatives the principles of Woodrow Wilson’s Fourteen Points and Franklin Roosevelt’s Four Freedoms—maybe even George Bush’s New World Order.

Seen in this light, the only real limitation to the expansion of republican citizenship, internally or externally, is a practical consideration, identified even by thoughtful left-liberals: a republican form of government cannot admit into citizenship too many who have not yet internalized republican values.⁷³ As we said at the outset of this subsection, the republic requires, in an irreducible core of its citizens, at least a modicum of distinctly republican civic virtue. To understand how the republic will ensure that its citizens, native-born as well as naturalized, embody those virtues, we must turn to the third essential element of republicanism, the social construction of the individual.

c. *Social Construction of the Individual*

Civic republicans all hold some version of the view that the individual is socially constructed.⁷⁴ Social constructionism is, of course, a notorious bogey in the modern academy.⁷⁵ At its most aggressive, it may well collapse into the deep paradox, if not circular absurdity, that all reality is socially constructed. But civic republicanism embraces a much milder form. As even its critics admit, this is “an uncontroversial descriptive insight into human behavior in the modern world,” which “[e]ven the most individualistic modern legal or political theorist would not dispute”: “a person’s views and attitudes are shaped in large part by the person’s experiences with other people, political institutions, and the larger social context.”⁷⁶

This amounts to a pretty commonsensical position. Adam and Eve may not have had navels, but the rest of us do; Abe Lincoln was not born in a cabin he built with his own hands. Even those who deny that it takes a village to raise a child must admit that it takes some community of responsible adults. Libertarians and anarchists may, in their minimalist states and states of nature, march to their different

73. See Bruce Ackerman, *Social Justice in the Liberal State* 93-95 (1980).

74. Gey, *supra* note 1, at 822.

75. For a survey of the social constructionist controversy, see Ian Hacking, *Are You a Social Constructionist*, *Lingua Franca*, May/June 1999, at 65-72.

76. Gey, *supra* note 1, at 811.

drummers or dance to their own music, but it will have been our world that gave them drumming and dance, marching and music – not to mention feet and ears. Nor was this perspective, for all its promotion by post-moderns, lost on classical republicans. As Livy said of the pre-republican Romans, “all were at one in wishing kingly rule, for they had not experienced the sweets of liberty.”⁷⁷

Critics, particularly left-liberals, fault civic republicans not for this descriptive position, which they themselves tend to share, but for their normative response to it. Civic republicans not only accept that human beings are to some extent socially constructed; they further maintain that the state has a proper, and properly large, role in that process. The republic may—no, must—inculcate republican values. Liberals, by contrast, insist that the state should be neutral toward competing notions of goodness, whether in the form of individual excellence or civic virtue.⁷⁸

Some republicans are admittedly a bit scary in their lack of specificity as to both the method and the aim of their state’s role in socially constructing the individual. But it does not follow that a less scary republicanism can’t be formulated consistent not only with the other elements of republicanism, but also with left-liberalism itself. All the republic needs, paradoxically, is the power to empower its citizens with a liberal education. The means need only be state authority and resources for a system of compulsory primary and secondary education – the first of which, of course, the state already has. And the end need only be this: to provide basic skills necessary for participation in the republic, including meaningful discussion about the fundamental values of the republic.

The content of this republican education need not include either quasi-religious catechizing or Orwellian thought-control. Most basically, such an education would have to cover the contemporary equivalent of the three Rs, the basic skills of verbal and mathematical literacy required for earning a living in a modern economy and understanding policy debates in a self-governing polity. This latter would have to include an understanding of the basic values of the republic itself: civic virtue, organic community, and the social construction of the individual.

To illustrate what a republican education would involve in the area of values, as opposed to skills, consider the much fraught issue of the Pledge of Allegiance in public schools. Under republican principles of universality and inclusiveness, “under God” would be strongly suspect. The reference to the United States of America as “one nation, indivisible,” would require a lot of explanation, in both directions. As we have seen, republicanism is nationalistic at most in

77. Livy, *supra* note 17, at 29.

78. See Gey, *supra* note 1, at 813.

a provisional way, and many conscientious American republicans, our schools would have to point out, were hardly wedded to the Union. Their motto, to quote their mentor, must be "The Union, next to our liberties, most dear."⁷⁹ And we would have to announce "with liberty and justice for all" as high aspirations honored, at least historically, as much in the breach as in the observance.

Even more problematic would be the form of the document, the pledge as a kind of secular creed, recited as a patriotic ritual in an environment that is hardly conducive to dissent. At the very least, the republic would have to let dissidents opt out with no penalty beyond self-identification as a dissenter. At best, the republic would probably dispense with such displays altogether, on the grounds that what they cost in coercion and stigmatization on balance outweighs any information they convey or patriotic sentiment they instill.

The republic could thus do well—maybe better—without a Pledge of Allegiance. But it could not do without a class in basic civics. Perhaps more important to the preservation of republican values is a course in republican history.⁸⁰ Without it we risk the situation Tacitus lamented in the era of Augustus: "How few were left who had seen the republic!"⁸¹

Admittedly, this kind of education cannot be pursued without a measure of coercion. But that coercion is much less extensive than the Orwellian world critics depict, and the republican state would have a great incentive to keep it as little as possible. Children are not likely to be entirely happy about having to go to any school at all, but the republic has good reason to make them appreciate, even enjoy, their education.

Republicans, having grasped the nettle of an affirmative role for their state in the social construction of its citizens, are not embarrassed by the observation that liberal education is not value-neutral.⁸² It is enough for them that the ultimate end of liberal education is the ability to question the value of everything, including

79. John Niven, *John C. Calhoun and the Price of Union* 173 (1988) (quoting John C. Calhoun).

80. See *infra* Part III.

81. Tacitus, *Annals* I.3, in *The Complete Works of Tacitus*, *supra* note 17, at 5.

82. See Nomi Maya Stoltzenberg, "He Drew a Circle That Shut Me Out": *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 *Harv. L. Rev.* 581, 655 (1993) [hereinafter *Liberal Education*].

Civic republicanism, at least in its modern incarnation, professes the necessity of value-inculcation, yet among the values whose inculcation it requires—the "civic virtues" of a republican society—are the very principles that define a liberal society dedicated to the toleration of diverse values and the necessity of a free choice among them, based on the critical-objective faculties of thought.

Id.; see also Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 *U. Chi. L. Rev.* 131 (1995).

liberal education.⁸³ Nor are they troubled that an education that empowers citizens to live as full republican citizens, questioning everything, necessarily precludes their full membership in certain other communities, particularly the patriarchal or otherwise authoritarian, where some are forbidden to question anything, and all are forbidden to question something. To be explicit, a little girl educated in the republic's schools may choose not to return, when she reaches majority and full citizenship, to her father's fundamentalist church or Orthodox temple; she may choose, instead, to leave behind the ersatz seventeenth-century farm or medieval ghetto and to move ahead into the new millennium's cosmopolis. To be blunt, so be it for her—and so much the better for the republic.

B. *Theory and Metatheory*

Contemporary civic republicans have thus constructed from basic elements of traditional republicanism a theoretical house that should accommodate, with more than moderate comfort, not only civic republicans themselves, but also their left-liberal critics. In some significant respects, indeed, the civic republican edifice offers a better home for left-liberals than they have been able to construct for themselves. It gives a better account of publicly-imposed liberal education, in response to communitarian critiques,⁸⁴ and it shores up the right-wing of the house of liberalism against sinking into libertarianism and more economically-oriented versions of individualism.

And yet there is a serious flaw in this edifice, which its left-liberal critics have been correct to point out and which its republican builders have not been particularly successful in repairing. What is worse, that flaw lies at the foundation of the structure itself. This section first examines the fundamental flaw of republican theory, then proposes a solution.

83. Cf. Robert Mangabeira Unger, *Knowledge and Politics* (1975).

84. See Miriam Galston, *supra* note 54, at 384-85 ("The reluctance among contemporary [liberal] legal theorists to consider the possible moral conditions of the deliberative enterprise is thus unreflective insofar as it exaggerates the coerciveness of alternative theoretical approaches, while ignoring or understating the coerciveness of its own teachings." (citation omitted)); Stoltzenberg, *Liberal Education*, *supra* note 82, at 659 ("Thus, not only is civic republicanism committed to the inculcation of liberal individualist values, but the liberal individualist commitment to 'the free mind' itself requires a certain kind of education—namely, education in the value of diversity, reason, and individual choice.").

1. The Problem: What's Below the Foundation?⁸⁵

Republicanism's fundamental flaw has two related, even reciprocal, dimensions. To see the first dimension, we must look downward and backward to the foundation on which republicanism rests and the materials from which that foundation has been built, its concurrent commitments to individual liberty and the common good. Where do these fundamental republican principles come from, and what do they themselves rest on?

To see the other dimension of the problem, we must look in the other direction, upward and forward. What guarantees that the foundation won't shift or be abandoned—even razed—by subsequent remodelers? In particular, what will keep the architects of the republic's future from abandoning its twin bases, individual liberty on the right and the common good on the left, the one for communitarianism or the other for libertarianism? To put this criticism most pointedly, republicans have built their house upon the sand, if not in the air, where it may at any point list badly, even topple, toward the left or the right.

Republicans' attempts to repair the first flaw have tended to worsen the second. As we have seen, contemporary republican theorists have tended to be left-liberals; along with left-liberals, they have mostly taken to heart the post-modernist critique of foundationalism. On this view, to say that values or norms have any ultimate, essential foundation, or to attempt to derive a normative "ought" from any descriptive "is," is impossible,⁸⁶ if not pernicious.⁸⁷ Faced with this yawning normative hole, republicans have made something of a virtue of necessity, filling the substantive void with process.

On this view, republican values do not emerge from the mists of metaphysics or metaethics (much less from the unmentionable murkiness of revealed religion). Nor are they merely the sum of arbitrary individual idiosyncrasies. Rather, they are forged in the comfortable and familiar process of dialogue, discussion, or—to use the big D-word—Deliberation. Republican values are made, not found, and they are made right here, by us (Americans), meaningfully participating in the prototypical republican process: public deliberation.

Now this may well be true, but republicanism's critics have rightly pointed out the danger of a serious inconsistency here. Granted,

85. In stating the problem, I am following the critique of Steven Gey, *supra* note 1, at 872-79. For other critiques along these lines, see works cited and summarized in Kalman, *supra* note 10, at 326 n.76.

86. J.L. Mackie, *Ethics: Inventing Right and Wrong* (1977); Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 Md. L. Rev. 853 (1992).

87. See Barbara Herrnstein Smith, *Contingencies of Value: Alternative Perspectives for Critical Theory* (1988) (arguing that foundationalism is necessarily reactionary, paternalistic, and oppressive).

republican values have emerged in some such way and will continue to be shaped in just that way. But it does not follow that these values are, in any transcendent sense, right or good; all that follows from republicanism's anti-foundationalist principles is that these values are here, shared by a more or less large constituency. Nor will it do, on anti-foundationalist principles, to say that the values are "really" good because they emerge from a process that is itself really good. Of that assertion, it can always be asked, "Says who?" To answer "We, the People" is at worst to beg the original question and at best to raise another: "What (or Who) makes 'we, the people,' or our normative pronouncements, 'really' good?" ("God" is a very good answer theoretically,⁸⁸ but a very bad answer politically.) Republican theoreticians have struggled mightily, along with many another, to get out of this circle—so far with no success whatsoever.

And it gets worse. By resting their core substantive values, liberty and the commonweal, on the dynamic process of deliberation, civic republicans run directly into the second aspect of their fundamental problem: how to ensure that the outcomes of present and future deliberation do not reject either individual liberty or the good of the people as a whole, or even deliberation itself. As we have seen, when their post-modernist assumptions made it necessary to reject absolute value, civic republicans made process their cardinal virtue. But that move threatens yet another vicious circle. If there is no absolute against which to test the outcomes of republican process, what keeps that process from producing anti-republican results? Indeed, if it is process alone that is the measure of republican results, then does it even make sense to ask whether a given result of the preferred process is republican or not?

Left liberals have taken little comfort in republican reassurances that this declension just won't happen, particularly with respect to core liberal values like freedom of expression and association. Here again, as an empirical matter, those assurances may well be true. But here again, if they are, it would not follow, as a normative matter, that what they assure is good.

The refurbished republican house thus has serious problems at its base: on the one hand, how to ground its value system without invoking unfashionable absolutes; on the other hand, how to substitute process for substance without leaving all values, process as well as substance, up for grabs, ultimately contingent on an uncertain, even unpredictable, future.

88. See Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 Duke L.J. 1229.

2. The Solution: Just More Republicans, All the Way Down

But that need not be the end of the story. There is a way past this fundamental problem, though a way not much recommended even by republicans themselves. Implicit in traditional republicanism is an answer both to the meta-theoretical problem of foundationlessness and the practical problem of preserving core values. It is not an answer that many proponents of republicanism will like,⁸⁹ but it is, I think, an answer entirely consistent with the republican tradition.

This way around the problem at republicanism's foundation is reminiscent of the apocryphal sage's defense of his faith's cosmological myth, the notion that the universe rests on the back of a great turtle. When asked what the turtle itself stands on, the sage replied, "Just more turtles, all the way down."

The essence of the answer, there as here, lies in making a virtue of another necessity, admitting that, at bottom, republicanism has no foundation but its history and no future that is not grounded in that history. As we have seen, Republicanism has grasped that nettle already in its embrace of the proposition that human beings are socially constructed. And, as we have also seen, republicans have gone the next step, assigning an active role to the state in the construction of citizens who embody republican virtues. But republicans have balked at the final step: conceding that the basis of their tradition's vision rests, ultimately, on nothing grander than the continued appeal of that tradition itself.

Thus we have found the foundation of the republic, and it is us. More precisely, it is our continued commitment to the substantive republican values of individual freedom and public welfare and the procedural value of public deliberation. To the anti-foundationalist denial of normative absolutes, with its implicit invitation to either nihilistic despair of any values or relativistic acceptance of all values, republicans may, and must, simply assert their own adoption of traditional republican values. We believe in them, not in the sense that we are convinced of their objective truth, but in the very different sense that we are committed to them as the basis of our political and moral lives.

This nicely cuts the Gordian knot of whether republican deliberative process can reject republican substantive values, whether republicanism rests ultimately on process or substance. Stated in those ahistorical terms, the puzzle cannot be resolved, and, as republicanism's critics have shown, every answer simply slides into one or the other of twin antinomies. Viewed historically and existentially, however, the conundrum simply disappears. Historical

89. See Kalman, *supra* note 10, at 163 (noting criticism that, "for all their postmodern posing and emphasis on dialogue, Michelman and Sunstein still searched for objective foundations of justice and common good").

republicanism is a movement in which the values of dialogic process and left-liberal substance are inextricably interwoven. Given our own citizenry's deep background in that history, and given an educational system in which future citizens are trained in that tradition, our citizens are unlikely to abandon either republican process or republican substance. We fortunately are starting with good citizens and we mean aggressively to make them better. The guarantee of where we are going is the point from which we have started and the direction in which we are headed.

But no republic is perfect, including ours. And republican historians from the beginning have reminded us, if I may borrow their rhetoric, that the blandishments of comfortable servitude always threaten to undermine the labors of liberty—the people can be, and have been, seduced.⁹⁰ Even then, though, all is not lost. When that has happened before—and if it should happen again—republican history affords ample answer: Caesar had his Brutus; Charles I, his Cromwell. The great republicans never took regicide lightly; Lincoln doubtlessly trembled to suspend the Great Writ. Those, including Cromwell and Lincoln, who choose to sacrifice deliberative process, however flawed, or the rule of law, however briefly, to guarantee liberty and welfare by other means have been judged most strictly. But they did what they had to do—what defense of the commonwealth demanded.

Subsequent republicans may still debate whether their choices were wise and most consistent with and conducive to republican norms. But no one can seriously doubt that, as they saw themselves, they were protectors of the commonwealth; much less can anyone deny that they are part of the republican tradition and thus the republican repertoire of responses. Republicanism, like our Constitution, is neither a simple proposition nor a tidy set of principles. But it is not a suicide pact, a petard on which its proponents need hoist themselves.

90. See Tacitus, *Annals* 1.2, in *The Complete Works of Tacitus*, *supra* note 17, at 3-4.

When after the destruction of Brutus and Cassius there was no longer any army of the Commonwealth, when Pompeius was crushed in Sicily, and when, with Lepidus pushed aside and Antonius slain, even the Julian faction had only Caesar [Octavius] left to lead it, then, dropping the title of triumvir, and giving out that he was a Consul, and was satisfied with a tribune's authority for the protection of the people, Augustus won over the soldiers with gifts, the populace with cheap corn, and all men with the sweets of repose, and so grew greater by degrees, while he concentrated in himself the functions of the Senate, the magistrates, and the laws.

Id.

III. THE USE AND ABUSE OF HISTORY: TOWARD A MORE REPUBLICAN REPUBLICANISM

Republicanism must use history—in particular, its own history—to both undergird and guarantee its present-day program. My reliance on historical republicanism is admittedly radical, in both senses of the word. It goes back to the roots of republicanism in a way that breaks rather sharply with present theory. On the other hand, however, invoking history is hardly a novel suggestion in the defense of republicanism, original or revived. As we saw at the outset, several strands of the Republican Revival have looked to history for just such help. This final Part looks more closely at that historical turn and its critics.

A. *Past and Present, or Looking Backward*

This section looks at two related aspects of republican history: first, the use that republicans are now making of traditional republican norms, then the norms that traditional republicans used in their own histories. Covering both topics in so short a compass cannot help some of the comic hubris, or chutzpah, of Hedda Gabler's ambitious admirer; like his first work, "a big book, dealing with the march of civilization," my coverage will have to be "in broad outline, as it were."⁹¹

1. The History of Republican Norms

Left-liberal theorists in constitutional law, building upon historians of republicanism, claimed that the American Constitution of 1787 embodied not just liberal principles, but also republican principles. These latter principles, they argued, could be used as legitimate grounds for criticizing what they saw as the troublingly individualist, anti-welfarist drift of the current United States Supreme Court. Critics—quite often including historians of republicanism—have responded that this line of reasoning involved a fatal anachronism. As these critics read the history of republicanism in America, that movement, strong though it may have been in the Revolution, had spent its force and been thoroughly replaced by newly-regnant liberalism by the time of the Constitutional Convention.⁹² Contemporary republicans respond that the historical record is not so clear; it remains to be seen whether liberalism totally displaced republicanism or whether republicanism merged into or otherwise

91. Henrik Ibsen, *Hedda Gabler*, in *Eleven Plays of Henrik Ibsen* 498, 518 (Modern Library, n.d.).

92. Kalman, *supra* note 10, at 175-76 ("There was no historical pedigree, however."); see Stolzenberg, *Civic Republicanism*, *supra* note 8, at 1044 (summarizing this objection).

influenced liberalism itself—whether, indeed, eighteenth-century liberalism and republicanism were ever so distinct as critics' total displacement hypothesis presupposes.⁹³

Several aspects of this debate warrant our attention. The first, and most important for our purposes, is the fact that the debate occurs in the context of constitutional law and, more particularly, in debates between left-liberals and right-liberals of a distinctly originalist cast. The former, in an effort to answer the latter on their own terms, have attempted to find the roots of their own left-liberal policy preferences not only in the Founder's minds and hearts but also in their written product, the Constitution's text.⁹⁴ If those preferences really informed the text of the Constitution itself—still a much disputed point—then that would indeed be the basis for a strong originalist argument against right-wing originalism.⁹⁵

Note, however, that the converse does not necessarily follow. Even if the Constitution did not, as a matter of historical fact, embody republican strands of the sort left-liberals are looking for, left-liberals can still argue against right-liberal originalists on other grounds. They can, for example, argue that originalism in anything but a very weak form is a poor constitutional theory.⁹⁶ Alternatively, even granting that strong originalism is a viable constitutional theory, they can argue that it does not form an adequate basis for current right-liberal developments in constitutional law. Even if the Constitution is a Lockean compact, and even if its Lockean principles must be scrupulously honored, they may not take us where the current Court is going.⁹⁷ That debate is well beyond the ambit of our discussion; for present purposes, it is enough to note that it would not be precluded by a finding that republican constitutional theorists have gotten their intellectual history of the Constitution wrong, just as their critics contend.

Moreover, left-liberal constitutional law scholars, as republicans, might broaden the debate even more in a way that would make

93. See Stolzenberg, *Civic Republicanism*, *supra* note 8, at 1045.

94. Kalman, *supra* note 10, at 139 (noting efforts of "some legal liberals . . . to appropriate originalism for themselves" and "advance alternative interpretations of the Founding to justify legal liberalism").

95. See Sunstein, *supra* note 48, at 604 ("The American constitutional culture gives special weight to the convictions of those who ratified constitutional provisions, and . . . I believe that this interpretive practice is legitimate.").

96. See Flaherty, *supra* note 11, at 555 ("A particular constitutional theory may hold, for example, that the events of the Founding are relevant in resolving constitutional questions, but that factors such as subsequent practice are dispositive.").

97. See Horowitz, *supra* note 34, at 149 ("As we begin to examine the reasons for the republican revival, we see that interest group pluralist and individualist conceptions of political and constitutional theory that have come to dominate constitutional ideology were not present in the thinking that was still prevalent after 1776.").

republican principles almost indisputably relevant. For all but the narrowest textualists, constitutional interpretation must be informed by an understanding of traditional concepts of ordered liberty.⁹⁸ Republican values, even if not directly imported into the Constitution, are certainly part of the Anglo-American legal and political tradition, and that tradition is itself part of a larger and longer republican conversation. Consider a single example, Milton's *Defense of the People of England*. Assigned the task of defending the Commonwealth's execution of Charles I, Milton consciously addressed himself to an international, not domestic, audience, and he carefully invoked the regicidal tradition of Republican Rome, not merely the traditional laws of England. Even if republicanism is not in our Constitution, in the narrow four-corners-of-the-parchment sense, it is certainly in our constitutional culture, more broadly conceived. As one scholar of the American Revolution has remarked, American Whigs "were looking backward to the constitution of Sir Edward Coke, to the constitution that beheaded Charles I and dethroned James II."⁹⁹

And legal scholars outside constitutional law are even less constrained by the outcome of historical debates about the directness of the role of republicanism in the shaping of the Constitution.¹⁰⁰ As we have seen, legal ethics scholars invoke republican strands in the history of the American legal profession as proof, not that the currently dominant conception of American lawyering is rooted in republicanism, but just the reverse. Their point is that a viable counter-tradition exists and that we may turn to that tradition for contemporary alternatives. What they need to show is not a continuous line of development from a republican past to the dominant model of today, but rather that the dominant model of today is merely that and not the sole model ever followed by American lawyers.

2. The Norms of Republican History

That latter, broader invocation of republican history invites a broader criticism of republicanism's reliance on history. Importing values from the past into the present is sometimes said to violate the norms of modern historical scholarship. According to those norms the past has no inherent normative authority over the present. The fact that particular values figured in the normative systems of the past, whether moral, legal, or aesthetic, gives them no necessary normative

98. See *Poe v. Ullman*, 367 U.S. 497, 549-55 (1961) (Harlan, J., dissenting).

99. John Phillip Read, *Constitutional History of the American Revolution* 5 (1993).

100. See Flaherty, *supra* note 11, at 555 ("Nearly every constitutional theorist believes history adds something to her account.").

authority now. The job of the intellectual historian, on this view, is to reconstruct what people in the past believed and valued, and to try to explain why. But this task is purely descriptive; it has no prescriptive role for the present or future.¹⁰¹

For those who profess some form of meta-ethical skepticism, like most modern republicans and post-modernists generally, this criticism is but a corollary of what they take to be a truism: you can't derive a normative "ought" from a descriptive "is." The same holds true in the case of history for any descriptive "was." Republicans can accept this point quite easily (most would probably insist upon it) because that is not what they are doing. They are turning to the past, not for directions as to what they normatively must do, but for what they may do, for proof; not of what is required, but of what is at least conceivable as a point of aspiration and perhaps possible as a matter of realizable accomplishment.¹⁰² On this view, others have sought a society that both narrowly restricts government interference in matters of conscience and broadly mandates government action for the common good, and have moved their own societies in that direction. So, too, may we.

And some modern republicans, like many past republicans, are looking for something more as well. They are looking not merely for a viable political platform, but also for role models. This is quite clear in legal ethics. Scholars critical of the dominant, highly individualist model of lawyering are not just looking for alternative theoretical models. They are also looking for particular lawyers who have lived admirable, emulatable lives according to those models. Their hero—and here "hero" is not too strong a word—is Louis Brandeis. They hold him up, not so much as the originating theorist of their preferred model of lawyering, but as its inspiration and embodiment, even as they urge reforms in his reformist model.¹⁰³

Celebrating heroes, of course, is rather out of fashion; we of the post-Watergate era are more inclined to look downward for clay feet than upward for laurelled brows. Republican history, however, has always had room for both perspectives. As Livy put it in his *History of Rome*:

101. Kalman, *supra* note 10, at 154 (arguing that legal theorists mistakenly interpreted republican Pocock as having "imbued the republican synthesis with a 'prescriptive authority'"). "For the historian, the past is relevant to the present insofar as it shows how other people lived their lives," but "[i]t does not explicitly tell historians or their contemporaries how to conduct their own." *Id.* at 180; Stolzenberg, *Civic Republicanism*, *supra* note 8, at 1045-46 (describing historians' criticism of lawyers' prescriptive use of history).

102. See Rob Atkinson, *Liberating Lawyers: Divergent Parallels in Intruder in the Dust and To Kill a Mockingbird*, 49 Duke L.J. 601 (1999) (discussing a similar borrowing of moral models from literature).

103. David Luban, *Lawyers and Justice* 169-74 (1998); William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* 127-37 (1998).

It is this particular that makes the study of history salutary and profitable: patterns of every sort of action are set out on a luminous monument for your inspection, and you may choose models for yourself and your state to imitate, and faults, base in their issue as in their inception, to avoid.¹⁰⁴

And his fellow republican Tacitus, at least on this point, was in accord:

My purpose is not to relate at length every motion, but only such as were conspicuous for excellence or notorious for infamy. This I regard as history's highest function, to let no worthy action be uncommemorated, and to hold out the reprobation of posterity as a terror to evil words and deeds.¹⁰⁵

Modern historians may object that this is not what they do, but they can hardly object, without transgressing their own appointed professional bounds, that this is improper for others to do.

To see why this is so, it will be helpful to invoke a set of distinctions drawn by Nietzsche in *The Use and Abuse of History*. Nietzsche's analysis identifies three modes of historiography: the monumental, the antiquarian, and the critical. Each, in his view, is both proper within its own ambit and essential to the proper functioning of the others and to the enterprise of history as a whole. Antiquarian history, with the indiscriminant nostalgia of a hometown museum or high school scrapbook, cherishes all that is old and familiar. Monumental history sorts through this veritable attic of antiques to rediscover and dust off for us, very much in the mode of Livy, models of excellence to emulate and (Nietzsche being Nietzsche) surpass. Critical history, finally, keeps monumental history honest, mostly by cutting its heroes down to size. Taken together, Nietzsche argued, this historiographic triad offers a vital alternative to the purportedly objective historiography that his nineteenth-century contemporaries were trying to build on value-free, scientific foundations.

Modern historians themselves generally reject the nineteenth-century model of historiography as a purely objective science to be dispassionately pursued; they tend to see that model as either unattainable or undesirable, or both. But what they embrace is much closer to that model than to Nietzsche's more traditional alternative, history with an essentially inspirational goal. Whatever the merits of their preference, it hardly gives them warrant to dismiss Nietzsche's model altogether. It may not measure up to their standards of history, but those standards themselves give them no warrant to condemn the use to which others put history. In particular, their methods may eschew evaluating the past for purposes of inspiring the present and future. But their methods do not entail the grounds for denying such evaluation by others outside their field. By their own terms, they can

104. Livy, *supra* note 17, at 18.

105. Tacitus, *Annals* 3.65, in *The Complete Works of Tacitus*, *supra* note 17, at 137.

appropriately tell us what was what and explain why it was, but they cannot tell us what or whom to admire. It does not follow from their professional renunciation of evaluation of the past in their work as historians that they can proscribe evaluation of the past by those who are outside that professional field. They may well deny themselves and their fellow historians the prerogative to distinguish heroes from villains, good from evil. But they, as historians, cannot deny that prerogative to the rest of us.

On the other hand, their mode of history can be very useful to those outside their field, particularly to those inclined to use history in more traditional modes. Monumental history, as Nietzsche was quick to admit, by its very nature tends toward hagiography, toward prettifying its heroes and caricaturing its villains.¹⁰⁶ Accordingly, as he himself insisted, it needs the constant corrective of a more critical, if never purely objective, brand of history.¹⁰⁷ Thus Livy, the prototype of monumental historians of the republic, has been caught out in a number of particulars, eager as he was to instill republican values.¹⁰⁸ One of those very values, however, was truthfulness,¹⁰⁹ including historical accuracy. By this baseline measure of modern history,¹¹⁰ which he explicitly took for his own,¹¹¹ Livy, for all his patriotism, ranks rather high.¹¹² Thus it is best for ourselves and our historical heroes, according to our heroes who were historians, if we seek to see them as Oliver the Protector instructed his portraitist to depict him to us: Warts and all.¹¹³

106. Frederick Nietzsche, *The Use and Abuse of History* 15 (Adrian Collins trans., Julius Kraft ed., 2d ed. 1957) (“[A]s long as the past is principally used as a model for imitation, it is always in danger of being a little altered and touched up and brought nearer to fiction.”). Much the same has been said of legal scholars who, according to critics, “notoriously pick and choose facts and incidents ripped out of context that serve their purposes.” Flaherty, *supra* note 11, at 554.

107. Nietzsche, *supra* note 106, at 20-22; cf. Flaherty, *supra* note 11, at 551 (“Among the academics and professionals who make up the audience which constitutional theorists seek to persuade, it is axiomatic that any argument drawing from another established discipline is convincing to the extent that it abides by the conventions of that discipline.”).

108. See Livy, *supra* note 17, at 8-9.

109. See *id.* at 210 (faulting Hannibal for having “no scruple to truth or sanctity . . . no respect for oaths or religion”).

110. See Flaherty, *supra* note 11, at 552 (“Perhaps the most basic [procedural norm of modern professional historians] is simply getting elementary facts straight.”).

111. Thus, at various points, he notes the unreliability of sources or laments the difficulty of choosing among conflicting accounts. See, e.g., Livy, *supra* note 17, at 21, 24, 251 (choosing the most patriotically appealing account, but insisting that it is “the version which is transmitted by most authorities and is confirmed by tradition”).

112. See Moses Hadas and Joe P. Poe, *Introduction* to Livy, *supra* note 17, at 11 (“In view of his patriotic objectives and his adherence to the modes of Hellenistic historiography, the remarkable thing about Livy is not his shortcoming as a scientific historian but his mature critical sense and his generally high reliability.”).

113. See Antonia Fraser, *Cromwell: The Lord Protector* 472 (1973) (reporting “warts and all” anecdote as “another example of a story, possible apocryphal, which yet survives for the innate truth it is felt to contain about the character concerned”).

This raises a final objection from the historian: Who gets to say what's a wart and what's a beauty-mark? Historians critical of the Republican Revival have noted that it is highly selective of the elements it borrows from the republicanism of the past.

Civic republicans eagerly attempt to jettison what they take to be inessential baggage of republics past: specific evils like franchise restrictions and slavery; more general problems including militarism, elitism, misogyny, patriarchy, parochialism, and various other forms of dominance or exclusion.¹¹⁴ Some critics of the civic republican program assert that these elements are not adventitious, but essential to republicanism, an assertion addressed at various points in Part II.

The charge to consider here runs in another direction: not that civic republicanism in its present form implies these admittedly bad elements, but that traditional republicanism did. Because traditional republicanism embodied these evils, then the current movement is not a revival or a revision of the republican tradition, but some sort of sham or imposter, a kind of sheep in wolf's clothing.¹¹⁵

Answering that charge again requires an appropriate division of intellectual labor. Surely it is within the ambit of modern historians, working in something analogous to Nietzsche's critical mode, to identify elements of the belief system of past republicans, even to distinguish those who identified themselves as republicans from those who did not. Historical republicans and republicanism are, respectively, people and parties of the past and the past, is indisputably the historians' proper province. And that province can also fairly be said to include this question: What elements of current ideologies, republicanism and others, can be said to bear the stamp of past republicanism?

It does not follow, however, that historians, as historians, have anything to say about a very different set of questions: What may those who currently identify themselves as republicans properly borrow or jettison from the republican past; what historical figures are "really" republican heroes, or villains; who, among various contenders, are the "real" or "true" inheritors of the republican tradition. These are matters for those who claim to be republicans today to decide among themselves.¹¹⁶ What they decide, and who and

and concluding that "the words do have an authentic Cromwellian ring").

114. See Kalman, *supra* note 10, at 160; Gey, *supra* note 1, at 804 n.5; Stolzenberg, *Civic Republicanism*, *supra* note 8, at 1045.

115. See Kalman, *supra* note 10, at 175-76. But cf. Horowitz, *supra* note 34, at 152 ("I am not saying that there is not some version of republicanism and rights that would deeply resonate and be true to late eighteenth-century discourses.").

116. On this general point Mark Tushnet, a leading critic of the Republican Revival, seems entirely in agreement: "Successors orient themselves to the tradition by identifying some elements in their predecessors' thought to which they continue to adhere and disregarding or explaining away other elements in that thought which they feel compelled to reject." Mark Tushnet, *The Concept of Tradition in Constitutional*

what influenced them and why, will all be matters for future historians of republicanism. Whether they decided rightly or wrongly, from their own normative perspective or from any other, is simply beyond the purview of analytic history, as analytic historians themselves have defined that purview.

We are free to choose to admire and emulate what we will from the past; historians can tell us that we have got our facts wrong.¹¹⁷ When they do, we who honor the republican tradition of historiography should thank them for the correction, not only on our own behalf, but also on behalf of our heroes themselves. But historians cannot, by their own standards, tell us who to emulate or what to admire.¹¹⁸ It is entirely for us to decide who our heroes are and what future, guided by our heroes, we will build.¹¹⁹ If they would do that, they must put aside the mantle of modern professional historian, worthy though that mantle is, and join us and our heroes in our dialogue about the things that really matter, our deliberation about who we are and what we will become.¹²⁰

B. *Present and Future, or Looking Forward*

This final section suggests several directions for that dialogue. It first suggests some fruitful lines for future historical research, and then projects how, fortified with the results of that research, we might advance the republic into its own future, which is, of course, ours. As Hedda's admirer admitted, "we know nothing of the future"; but, as he insisted, "there is a thing or two to be said about it all the same."¹²¹

Historiography, 29 Wm. & Mary L. Rev. 93, 94 (1987). Oddly, however, he seems to deny adherents to the particular tradition of civic republicanism precisely that relation to their own antecedents: "Precisely because republicanism was a complex of ideas that made sense only as a unit, we cannot select from it only one or two strands Unfortunately, neither can we re-appropriate it as a unit" *Id.* at 98. Equally oddly, Tushnet insists on speaking of republicanism either as an eighteenth-century movement, *id.* at 93, or as that movement's subsequent adherents, *id.* at 94, in both cases ignoring the much deeper roots of the republican tradition.

117. See Sunstein, *supra* note 48, at 605 ("[In contrast to historians' effort] to reimagine the past," "the constitutional lawyer is trying to contribute to the legal culture's repertoire of arguments and political/legal narratives that place a (stylized) past and present into a trajectory leading to a desired future.").

118. See Kalman, *supra* note 10, at 171 ("Though [we] historians may be the only ones whose primary interest is in historicizing the past, why should we criticize others for using it in different ways?").

119. This, it seems to me, is quite consistent with Mark Tushnet's "modest conclusion" about the Republican Revival: "It shows us that we must constitute our society for ourselves, aware of but neither bound by nor able to reproduce the experiences of the past." Tushnet, *supra* note 116, at 98-99.

120. See Kalman, *supra* note 10, at 142-43 (describing how republican law professors, following the suggestion of Richard Rorty, explicitly began dialogues with the past).

121. Ibsen, *supra* note 91, at 548. If my speculations misfire, may I shoot myself in no more vital an organ than the foot. He, alas, was not so lucky. *Id.* at 596. Like his, my treatment of the future "falls into two sections." "The first deals with the civilizing

1. The Future of Republican History, or a Republican Research Agenda

Republican history, as we have seen, is history with a purpose. Stated most generally, that purpose is to ensure that the future lives up to the standards of the past and delivers on its dual promise: protecting the people's liberty and promoting their welfare.

a. *Broadening the Republican Base*

The first and most important research project should be to expand the house of republicanism. This would require broadening not so much its theoretical scope as its cultural inclusiveness. The Republican Revival has tended to look back on a mostly Western European history and pantheon of heroes: the American Founders, the English revolutionaries, the Renaissance emulators of the ancient Roman Republic, the Roman republicans themselves. In an era of increased internationalism and multiculturalism, the republican movement needs to look for parallel developments in other cultures and countries. In particular, because of both their cultural richness and their geopolitical importance, we need to look at the non-Latin Christian culture of eastern (mostly Slavic) Europe; the world of the third great Western monotheism, Islam; and the ancient and rich cultures of the Indian subcontinent, eastern Asia, and sub-Saharan Africa. Surely in some or all of these cultures we will find historical moments, if not contemporary movements, that share republican values.

To see how useful it might be to find such connections, consider but a single example: the contemporary conflict of Western culture and fundamentalist Islam. By pointing to several examples of very different kinds of Islam, we may well be able to make common cause with members of the world Muslim community whose traditional values—traditional Islamic values—are entirely compatible with our own. We know that a Muslim culture of extraordinary diversity and tolerance flourished in medieval Iberia; Christians, Muslims, and Jews lived together for centuries under Islamic law and the Arabic language.¹²² We know that their common culture fostered and preserved texts, especially by Greek authors, that we consider fundamental to the European canon. For all the anti-modernism of many elements of today's fundamentalist Islam, we know that

forces of the future"; "the second . . . forecasting the probable line of development." *Id.* But I am, if anything, more presumptuous than he: in my second part I suggest not just one line of development, but two.

122. Maria Rosa Menocal, *Culture in the Time of Tolerance: Al-Andalus as a Model for Our Own Time*, Address Before the Middle East Legal Studies Seminar (May 9, 2000), in *Yale Law School Occasional Papers, Second Series, Number 6* (on file with author).

medieval Islamic culture equaled or exceeded that of the Christian west in mathematics, medicine, and astronomy.

But we must, as conscientious historians and lawyers conscious of the standards of historical accuracy, recognize the possibility that, in at least some cultures, there simply are no plausible close parallels to anything remotely like modern Western culture. That prospect suggests a second related project: examining the extent to which modern Western culture has been willing and able to incorporate exogenous elements and the extent to which constituents of modern Western culture have themselves come from outside. With respect to the former, for example, we know that the Roman republicans themselves were quite willing to learn from the Greeks, even to graft the very origins of their capital and their people onto the formative Greek epic of the fall of Troy.¹²³

Moreover, Europe itself has not always had what we now think of as a European culture. As we offer the European vision of republicanism to the world, it would be well to remind ourselves and to tell the world that for most of Europe's own peoples and for much of their history, the republican tradition has been distinctly foreign and unfamiliar (as, for that matter, were all three forms of Abrahamist monotheism: Judaism, Christianity, and Islam).

b. *Testing Trends Against Traditions*

Even as we reach out to include other cultures in an expanding republicanism, we must constantly test the contents of that republicanism against the republican past. Let me give just a single example here, from the narrower topic of this symposium, professional responsibility. For nearly two decades now, the American legal profession has been in the midst of a professionalism crusade.¹²⁴ No small part of that crusade has been the goal of restoring the legal profession to its fundamental values. One of these values is taken to be civility.¹²⁵ Without further specification, civility would seem to be an indispensably republican value, something allied to the core republican notion of civic virtue. Yet, when one looks at some of the elaborations of civility widely current today, one wonders. Civility as currently understood means a kind of categorical, across the board "niceness," not a contextually sensitive, rebuttable presumption of mutually respectful behavior.

Many central moral figures in the Western moral and religious tradition, the prophet Jesus and the patriarch Jacob chief among

123. Livy, *supra* note 17; Virgil, *The Aeneid* 3-4 (Robert Fitzgerald trans., Alfred A. Knopf, Inc. 1992).

124. See generally Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 Tex. L. Rev. 259 (1995).

125. See *id.* at 275-76.

them, would not fit well into this Procrustean notion of civility.¹²⁶ The same could also be said of Cicero. Without doubt, he was both one of the most revered martyrs in the republican pantheon and one of the most respected of Roman lawyers;¹²⁷ as we saw at the outset, Milton's brief for the English Commonwealth rested largely on the precedent of Cicero's defense of Brutus. But Plutarch, himself no small fan of Cicero, tells us that Cicero simply could not resist the acerbic retort, even the ad hominem insult.¹²⁸ Perhaps Cicero should have been nicer; Plutarch suggests that his sarcasm sometimes undercut his rhetorical powers. But it is at least worth noting another possibility: perhaps we should re-think the fetish we have made of Mister Rogers' mannerliness.

c. *Rehabilitating Republican Heroes, and Heroic Republics*

Students of republicanism, to their credit, have not been shy about including erstwhile pariahs in their pantheon. To take but the clearest example, their principal bridge between ancient and modern republicanism, Machiavelli,¹²⁹ is, in popular parlance, the very eponym of political skull-duggery. With an eye toward a similar rehabilitation, I recommend that republican scholars, both in history and in other disciplines, reconsider the English Commonwealth and its principal statesman: Oliver Cromwell.

This third project is by no means of strictly antiquarian interest; rather, it bears directly on the first two, expanding the republican tent and re-evaluating our own contemporary commitments. With respect to the first, rehabilitating Oliver in particular and the Commonwealth interregnum more generally would permit a much-needed expansion of today's republican movement. Contemporary left-liberalism is notoriously out of touch with people of traditional religious affiliation, especially those who profess evangelical forms of Christianity. Mutual support, strong in the Civil Rights movement, has diminished as the political left has turned to broader, and perhaps deeper, social and economic issues.¹³⁰ Yet it was precisely the antecedents of most

126. Rob Atkinson, *Br'er Rabbit Professionalism: A Homily on Moral Heroes and Lawyerly Mores*, 27 Fla. St. U. L. Rev. 137 (1999).

127. See Fink, *supra* note 45, at 5 (citing Cicero as the chief classical inspiration of the seventeenth-century English republicans); Pettit, *supra* note 19, at 19 ("This tradition had its origins in classical Rome, being associated in particular with the name of Cicero.").

128. Plutarch, *The Lives of the Noble Grecians and Romans* 1070 (John Dryden trans., Modern Library 1932) ("Cicero's love of mockery often ran him into scurrility; and in his love of laughing away serious arguments in judicial cases by jests and facetious remarks, with a view to the advantage of his clients, he paid too little attention to what was decent . . .").

129. See, e.g., J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Revolutionary Tradition* (1975).

130. Stephen Carter, *God's Name in Vain: The Wrongs and Rights of Religion in*

evangelical denominations in the Anglo-American world who formed the core of support for the English Commonwealth; the support tended to last longest among the lower-class and lesser-educated. Even James Harrington, the darling of modern republicans, was thoroughly imbued with the religious tone and terminology of the age.¹³¹ As one modern student of seventeenth-century republicanism has noted, "In republican minds, and in Milton's mind, the relationship between civic and religious virtue is a close one."¹³²

And just as a re-examination of the Commonwealth could help revive ties between the contemporary secular left and the traditional religious left, so it could help the former reassess its own positions. Somewhat surprisingly, theorists of contemporary republicanism have taken as their paragons James Harrington and his epigoni.¹³³ Harrington was certainly a republican theorist and propagandist; his *Oceana* may have been as radical as Milton's "Ready and Easy Way to Establish a Free Commonwealth." But Harrington was neither a regicide nor a prominent leader during the revolution. And the followers of Harrington, who himself published nothing after the Restoration of the monarchy in 1660, made from their master's work a position much more conservative than the original.¹³⁴ In the words of one student of the period, "They succeeded in making him a great figure after 1688, a prophet of the rule of the propertied and the British Empire."¹³⁵ Among more active revolutionaries and less compromised branches of the revolutionary movement, modern republicans might find more inspiring and more palatable models. The American Revolutionaries certainly did.¹³⁶

Politics 35, 44 (2000).

131. Christopher Hill, *The Experience of Defeat: Milton and Some Contemporaries* 193, 199 (1984); see also Pocock, *supra* note 129, at 399 (discussing coordination of Roman Republican and Christian apocalyptic elements in *Oceana*)

132. Blair Worden, *Milton's Republicanism and the Tyranny of Heaven*, in *Machiavelli and Republicanism* 225, 230 (Gisela Bock, Quentin Skinner, and Maurizio Viroli eds., 1990).

133. See Pettit, *supra* note 19, at 19.

134. Hill, *supra* note 131, at 201-06.

135. *Id.* at 206; see also Fink, *supra* note 45, at 188-89 ("[N]o one can contemplate the development of British imperial policy without believing that the Roman-inspired imperialism of Harrington was an important determinant in the intellectual pedigree of that system . . .").

136. See Bailyn, *supra* note 17, at 34 (noting the origins of the English eighteenth-century radical political thought that most inspired American Revolutionaries as "the radical social and political thought of the English Civil War and Commonwealth period"); *id.* at 35 ("The colonists identified themselves with these seventeenth century heroes of liberty."); see also Worden, *supra* note 132, at 227 ("The development and variation of republican theory across those three generations [from the 1650s through the 1690s] are less imposing than the continuity, even the repetition of a body of ideas which the work of Zera Fink, Caroline Robbins, Felix Raab, and John Pocock has brightly illuminated.").

In particular, we might look to Milton's candidate, Cromwell himself. As a first step toward Cromwell's re-integration into the republican pantheon, consider a few testimonials. They come either from admirers whom we already respect or from opponents who, grudgingly or otherwise, respected him. To begin with Cromwell's contemporaries, surely the best-remembered today is John Milton. We know Milton mostly as a poet and mostly for his post-Commonwealth epic, *Paradise Lost*. But he served the Commonwealth from the beginning to the end always as a loyal supporter of the Cromwellian line, even when his sympathies lay to the left. To Milton fell the hugely important task of legitimating the regicidal republican regime; to him, also, fell the more mundane job of Latin Secretary, which involved virtually all diplomatic correspondence. These commissions, along with his quasi-official pamphlet campaigning, almost certainly cost him his eyesight. They also made him a hero of the next century's republican theorists,¹³⁷ who in turn were a principal source of inspiration for the American Revolutionaries.¹³⁸

On the leader of his cause, he could wax extremely—by our standards, embarrassingly—effusive:

Cromwell, our chief of men, who through a cloud / Not of war only,
but detractions rude, / Guided by faith and matchless fortitude / To
peace and truth thy glorious way hast ploughed, / And on the neck
of crownèd Fortune proud / Hast reared God's trophies and his
work pursued, / While Darwen stream, with blood of Scots imbrued,
/ And Dunbar field resounds thy praises loud, / And Worcester's
laureate wreath; yet much remains / To conquer still: peace hath her
victories / No less renowned than war; new foes arise / Threat'ning
to bind our souls with secular chains. / Help us to save free
conscience from the paw / Of hireling wolves whose gospel is their
maw.¹³⁹

Milton wrote that sonnet in May 1652, near the peak of the Commonwealth's power and appeal. Doubtlessly Milton's optimism about Cromwell dimmed a bit with departures from his preferred republican ideals; perhaps his effusion was tainted a bit by euphoria, if

137. Thus, for example, William Wordsworth took admiration of Milton to be the touchstone of republican standing:

Great men have been among us; hands that penned
And tongues that uttered wisdom – better none:
The later Sidney, Marvel, Harrington,
Young Vane, and others that called Milton friend.

Fink, *supra* note 45, at ii (quoting Wordsworth).

138. See Bailyn, *supra* note 17, at 34 ("Among the seventeenth-century progenitors of this line of eighteenth-century radical writers and opposition politicians . . . Milton was an important figure—not Milton the poet so much as Milton the radical tractarian . . .").

139. John Milton, *Sonnet XVI to the Lord General Cromwell*, in *The Complete Poetical Works of John Milton* 190, 190-91 (Douglas Bush ed., 1965).

not adulation. But Milton stood by Cromwell to the end and by the Good Old Cause beyond the end.¹⁴⁰ On the very eve of the restoration of the monarchy he published *True Commonwealth*. Had he been a flatterer, that would have been the better time for it; as it was, he spent several very tense months under arrest and very narrowly escaped execution.

But even if Milton's praise of Cromwell was sincere, it was hardly non-partisan. For that, consider the opinion of another contemporary, George Fox, one of the founders of the radical Puritan sect we call the Quakers. In Cromwell's time the Quakers had not yet earned their breakfast-cereal safe reputation; they were almost universally regarded as dangerous radicals. Their refusal to take oaths, and even more their tendency to disrupt rival religious meetings, kept them often afoul of the law. Cromwell frequently intervened for leniency on behalf of members of the sect, including Fox himself.¹⁴¹ Fox's autobiography includes accounts of several amicable meetings with Cromwell; one of the last of those meetings, in Cromwell's official residence at Hampton Court, ended like this:

Many more words I had with him; but people coming in, I drew a little back. As I was turning, he caught me by the hand, and with tears in his eyes said, "Come again to my house; for if thou and I were but an hour of a day together, we should be nearer one to the other"; adding that he wished me no more ill than he did to his own soul.¹⁴²

Nor were the Quakers the only persecuted sect who benefited from Cromwell's policy of tolerance. With his consent and under his personal protection, Jews, banned from England since the Middle Ages, were permitted not only to return but also to practice their religion openly and freely.¹⁴³ This has earned Cromwell a place in *The Jewish Encyclopedia* and honorable mention from Golda Meir's foreign minister, Abba Eban.¹⁴⁴

Cromwell's generosity toward Jews may have been the reason he

140. Hill, *supra* note 131, at 314 ("Milton criticized the avarice and ambition of the Parliamentary leaders and generals: like Marvell, he never condemned the Good Old Cause itself, nor indeed Oliver Cromwell."). *But cf.* Worden, *supra* note 132, at 241 ("Although the evidence for the development and the depth of Milton's personal hostility to Cromwell is thin, the poet is certainly capable of having come to share the belief of other republicans that the protector had sacrificed the revolution on the altar of his own ambition.").

141. See C.V. Wedgwood, *Oliver Cromwell* 94 (rev. ed. 1973) ("After an interview with George Fox, he allowed the Quaker movement to gather momentum unmolested."); *id.* at 111 ("His generous encouragement of the Quakers, in some ways the most extreme, as they were also the most constructive, of the new sectaries, was much to his credit.").

142. George Fox, *Journal* 106 (Ernst Rhys ed., 1924).

143. Abba Eban, *Heritage: Civilization and the Jews* 207-08 (1984); Wedgwood, *supra* note 141, at 111.

144. Eban, *supra* note 143, at 208.

was the particular hero of Sigmund Freud. Freud published his *Interpretation of Dreams* in 1899 at the end of fin-de-siecle Vienna with all its general cultural glories and its exceptionally open multiculturalism, of which Freud himself was both a beneficiary and an exemplar. But it was also the Vienna that bred Hitler. Anti-Semitism was unmistakably on the rise, even at the center of the Austro-Hungarian Empire. Casting about for a haven in history, at the dawn of the unspeakable horrors of the Holocaust, which drove him off the continent to England, Freud hit upon Oliver's Commonwealth: "I am recalling what is for me the most interesting historical period, the reign of the Puritans and Oliver Cromwell."¹⁴⁵ In homage to his hero, he named his second son Oliver.¹⁴⁶

Theodore Roosevelt, a contemporary of Freud, is currently undergoing critical re-assessment himself. In 1901 Roosevelt published a biography of Cromwell.¹⁴⁷ He was looking back, as Freud was, at the turn of the last century. But his perspective was perhaps less like Freud's and more like ours. Like us, he was looking for guidance forward on the threshold of a new century. He was the young, idealistic President of a country that stood in the world then as Milton had seen England stand in Oliver's time: a "puissant nation rousing herself like a strong man after sleep, and shaking her invincible locks . . . an eagle mewing her mighty youth, and kindling her undazzled eyes at the full midday beam . . ."¹⁴⁸

Roosevelt was not bashful about power, or about projecting power overseas: he dispatched a great naval flotilla on a global tour to show American strength; he coined the phrase "speak softly and carry a big stick." But his was no crude gunboat diplomacy, and if he was a bit of an imperialist adventurer, his ambitions were solidly for the progress of the values he read from the great Anglo-American revolutionary tradition. He didn't need to be reminded that with great power comes great responsibility; he was ready to remind others what America, in her first century as a world power, would be responsible for. He had been thrust into the Presidency by the assassination of his predecessor, an act of terrorism shocking even by the standards of our own shocked era. He took to heart Oliver Cromwell's paradoxical motto: "War for peace."

Here is Roosevelt's assessment of the Commonwealth and its leaders:

The whole history of the movement which resulted in the establishment of the Commonwealth of England will be misread and misunderstood if we fail to appreciate that it was the first modern,

145. Maurice Ashley, *The Greatness of Oliver Cromwell* 369 (1957).

146. *Id.*

147. Theodore Roosevelt, *Oliver Cromwell* 6 (1901).

148. John Milton, *Areopagitica*, in 1 Norton Anthology of English Literature 1349, 1359 (3d ed. 1974).

and not the last mediaeval, movement; if we fail to understand that the men who figured in it and the principles for which they contended, are strictly akin to the men and principles that have appeared in all similar great movements since: in the English Revolution of 1688; in the American Revolution of 1776; and the American Civil War of 1861. . . . Fundamentally, it was the first struggle for religious, political, and social freedom, as we now understand the terms.¹⁴⁹

And he was no less laudatory of Oliver himself:

Sooner or later, justice will be done him; sooner or later, he will be recognized, not only as one of the greatest of all Englishmen, and by far the greatest ruler of England itself, but as a man who, in times that tried men's souls, dealt with vast questions and solved tremendous problems; a man who erred, who was guilty of many shortcomings, but who strove mightily toward the light as it was given him to see the light; a man who had the welfare of his countrymen and the greatness of his country very close to his heart, and who sought to make the great laws of righteousness living forces in the government of the world.¹⁵⁰

Roosevelt, of course, was not a professional historian and, in any event, his assessment is dated as well as tendentious. Among professional historians, Cromwell's fortunes sank in the first half of the twentieth century; comparisons to contemporary dictators were all too ready at hand.¹⁵¹ He has fared much better since.¹⁵² "But," to put it mildly, "his career and character remain controversial."¹⁵³ Even honest admirers cannot fully absolve him of all that he did, or allowed to be done¹⁵⁴—nor, to recall his instructions to his portraitist, would he himself have wanted to be whitewashed. Still, we may let one of his admirers—both a noted historian and a self-identified partisan of the political left¹⁵⁵—have the last word here:

So long as men and women 'with the root of the matter in them' call

149. Roosevelt, *supra* note 147, at 6.

150. *Id.* at 240-41.

151. See Ashley, *supra* note 145, at 17-18 (noting tendency of biographers of the 1930s to assimilate Cromwell to fascist dictators); Wedgwood, *supra* note 141, at 119 ("In 1939 the shadow of the European dictatorships darkened his image and historians who still clung to the older liberal interpretations of him as a national hero in the evolution of English liberty were thrown on the defensive.").

152. See Wedgwood, *supra* note 141, at 120 ("If Cromwell is not quite a national hero, he is generally recognized as a great figure in our history, the soldier-statesman who put an end to civil war, restored peace at home and respect abroad.).

153. *Id.*

154. As to the darkest blot on his career, the atrocities of Commonwealth forces in Ireland, even his admirer and rehabilitator, Thomas Carlyle could manage no more than to let him speak for himself. Cf. Ashley, *supra* note 145, at 227-39 (defending Cromwell's Irish campaign as warranted by the standards of warfare, then and now).

155. See Pocock, *supra* note 129, at 336 (referring to "the older Marxism of Christopher Hill," citing his "Puritanism and Revolution" (1958) and *Society and Puritanism in Pre-Revolutionary England* (1964)).

in question those values of their society which deny our common humanity, so long indeed as the great issues of liberty and equality which Oliver raised remain unresolved, so long will he continue to fascinate, and the debate over him will continue.¹⁵⁶

2. The History of the Republican Future, or a Republican Political Platform

We, of course, are looking back a century after the first Roosevelt, and the century that separates us from him contains horrors that even one as steeped as he in history and tragedy could hardly have imagined. He lost a favorite son in the first world war of the twentieth century; his cousin Franklin led the Western alliance through the unspeakable holocaust of the second. Chastened by that all too recent past, let us look forward to not just one republican future, but two: the first in which the republic fares as well as we can hope; the second, not so well.

a. *The New World Order, or Republicanism Triumphant At Last*

In domestic matters, imagine George W. Bush genuinely striving to build his father's "kinder, gentler America," the junior Bush fulfilling his own rhetoric of "compassionate conservatism." From the perspective of the present and recent past, of course, this seems hopelessly unlikely. We remember all too well the father's declension from decrier of "Voodoo Economics" to cheerleader for supply-side and trickle-down, nor will we soon forget the son's warm embrace of the religious right and the economically ultra-privileged (not to mention the former Senate majority leader's Dixiecratic indiscretions). But changes as strange have come to pass. At the dawn of the last century, who could have found the seed of Roosevelt and Taft's reforms in the rot of the Grant and Hayes administrations?

In international affairs, imagine the younger Bush, who scorned nation-building in his first campaign,¹⁵⁷ laying the foundation of his father's "New World Order" by the blueprints of Wilson's "Fourteen Points" and FDR's "Four Freedoms." The U.N. could become what

156. Christopher Hill, *God's Englishman: Oliver Cromwell and the English Revolution* 275-76 (1970).

[W]e in England to-day can see our problems in secular terms . . . because our ancestors put an end to the use of the Church as an exclusive and persecuting instrument of political masters, not because we are wiser and better, but because Cromwell, stabling in cathedrals the horses of the most disciplined and most democratic cavalry the world had yet seen, won a victory which for ever stopped men being flogged and branded for having unorthodox views.

Christopher Hill, *The English Revolution, 1640*, at 16-17 (1985).

157. David E. Sanger, *A Delicate Dance of the Interventionist and the Reluctant Internationalist*, N.Y. Times, Oct. 11, 2000, at A25.

the League might have been; the Pax Americana may be policed, not only by NATO and the IMF, but also by the International Committee of the Red Cross—and Crescent. “Regime changes” in Afghanistan, North Korea, and Iraq could usher in Marshall Plans for the new century and the new millennium. In the new plans, as in the old, magnanimity toward old enemies might spill over into generosity toward exhausted allies, and even beyond.

The U.N. declaration on children¹⁵⁸ could be fulfilled, funded by President Bush’s reversal of his first term tax cut and similar policies among all the industrialized nations. In a massive redistribution of wealth from industrialized to developing nations, every child in the world is guaranteed a nutritious diet, adequate health care, and a primary and secondary education uninterrupted by the necessity of adult work, much less work under sweatshop conditions. Beyond that, every child could be given access to the internet, either at home or within safe walking distance, and could be taught to read in two languages: that of his or her homeland and English. Ideally, every child would learn the history of the Republic, alongside the heritage of republican movements in his or her own homeland and language. As a result, every child could choose to be a member of the republic, a citizen of the world. By the end of the century we have just begun, the language of Lincoln could be the *lingua franca* of the planet, and the Roman Republican vision of liberty and commonwealth under law, the constitution of humankind. The American Republic, midwife of that global renaissance, will have become what Milton and the Commonwealthmen wanted England to be, the Rome of the West.

b. *The Good Old Cause, or Republicanism Underground Again*

But that is not, of course, the direction in which we are headed. In domestic affairs, the rich are getting richer and the poor, poorer — both at an astonishing rate. If current economic trends continue for but a little while longer, we soon will have descended to disparities of wealth rivaled by only one era in our history, the Gilded Age. In the near future as in the not so distant past, at the beginning of the new century as at the beginning of the old, a mere one percent of the population may control fully half of the nation’s bounty.¹⁵⁹

Internationally, matters already more dire may become truly desperate. President Bush may lead us into an unnecessary war with an implacable enemy in a notoriously volatile region. Distracted by his grudge match with his father’s nemesis, we may ignore developments every bit as ominous as the proliferation of weapons of

158. *U.N. Declaration of the Rights of the Child*, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354 (1959).

159. Kevin P. Phillips, *Wealth and Democracy: A Political History of the American Rich* (2002).

mass destruction: the devastation of entire continents by infectious disease; the despoliation of irreplaceable ecosystems by rapacious, robber—baron capitalism; the displacement of emerging democracies by religious fundamentalism and tribal barbarism. In a word, things may well go from bad to worse. Indeed, it is hard not to share the frustration of the defeated populist Tom Watson at the beginning of the last century, “the world is plunging Hellward.”¹⁶⁰

But, unless worse comes unthinkably to worst, all cannot be lost. Come what may, we need never forget where we have come from, and where we mean to get to. Even if our old cities were razed and our own nation ruined, we could take with us into exile the foundations of our own new Rome. In an hour darker than any we are likely to know, Lincoln could pledge himself to preserving the true republican project, government of the people, by the people, and for the people. When the first English-speaking Republic had collapsed, after the old order of kings and lords had been restored, Milton could still find courage to call for a true Commonwealth. We may well hope that, however dark the coming days, we will always find ourselves in the fellowship of those who pay more than lip service to Lincoln’s republican pledge, who press on undiscouraged toward Milton’s less remembered but more desirable paradise.

CONCLUSION

At the invitation of the editors of the *Fordham Law Review*, I have argued that the most significant development in law and legal ethics has been the birth in ancient Rome, and the rebirth in diverse times and places in the West and beyond, of the republican ideal: government that both respects individual liberty and promotes the common good. I very much appreciated receiving the invitation, and I have thoroughly enjoyed making the argument.

In all candor, however, I rather doubt that the argument I have made is quite what my hosts had in mind; I somewhat suspect that their invitation, though millennial in its timing, was more contemporary in its intended focus. Be that as it may, what I said at the outset remains just the same. Fordham’s institutional perspective is long enough and broad enough to accommodate my project more than comfortably; the Jesuit educational tradition, like the classical tradition of which it is an appropriately proud part, takes everything human as its proper scope.

In that ecumenical and catholic spirit I have tried to make my case; in that spirit I now entreat you, too, to join the dialogue that began in Republican Rome and has run through the English Commonwealth and our own Revolution right down to us, today. That is the first and

160. C. Vann Woodward, Tom Watson: Agrarian Rebel 396 (Oxford Univ. Press 1975) (1938).

essential step toward reviving the Roman Republic and remembering the Good Old Cause. As we take that step, whether we bid them or not, Brutus and Cicero, Milton and Cromwell, Lincoln and Wilson, all will be with us.